SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-252

LAWRENCE E. BIESKI, ET AL., *Petitioners*

v.

EASTERN AUTOMOBILE FORWARDING COMPANY, INC., M & G CONVOY, INC., and HIGHWAY TRUCK DRIVERS and HELPERS, LOCALS 107 and 326, Unincorporated Associations Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and EASTERN CONFERENCE AUTOMOBILE TRANSPORTERS JOINT COMMITTEE, *Respondents*

and

JOSEPH A. SOCKLOSKY, ET AL., Acting on Their Own Behalf and on Behalf of Approximately Eighty-One Other Drivers Presently Employed by M & G Convoy, Inc., *Intervenors*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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and

JOSEPH A. SOCKLOSKY, ET AL., Acting on Their Own Behalf and on Behalf of Approximately Eighty-One Other Drivers Presently Employed by M & G Convoy, Inc., *Intervenors*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Lawrence E. Bieski, *et al.*, pray for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals (App. A, *infra*, p. 1a) is not yet reported. That opinion affirmed a memorandum opinion of the United States District Court for the District of Delaware (App. B, *infra*, pp. 2a-6a) not yet reported. This memorandum opinion enforced the unreported decision (App. C, *infra*, pp. 7a-12a) by respondent Eastern Conference Automobile Transporters Joint Committee. Other related opinions (App. D, *infra*, pp. 13a-34a) are that of the Third Circuit Court of Appeals reported at 396 F.2d 32 and District Court decisions dated July 9, 1970 (App. E, *infra*, pp. 34a-39a), not yet reported, and March 2, 1973 (App. F, *infra*, pp. 40a-45a), not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 11, 1974. The jurisdiction of this Court is invoked under 29 U.S.C. § 185(a).

QUESTIONS PRESENTED

1. Is the duty of fair representation applicable to the union representatives of a Teamster Joint Committee?

2. If so, was that duty breached so that the Joint Committee's decision must be set aside?

3. May a decision of the Joint Committee be overruled because of an absence of procedural due process?

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185(a) (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as de-

fined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT

This case concerns seniority rights under a collective bargaining contract. There are two companies involved: Eastern Automobile Forwarding Company, Inc. (Eastern), and M & G Convoy, Inc. (M & G), both of whom hauled Chrysler Corporation automobiles from Newark, Delaware. In January 1964, Eastern sold its real estate and all of its operating equipment to M & G and went out of business. Subsequent to the sale, all cars formerly transported by Eastern were handled by M & G.

Petitioners were formerly employed as truck drivers by Eastern. They, and also the drivers at M & G, were represented in 1964 by Highway Truck Drivers and Helpers, Local 107, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 107). The union and both Eastern and M & G were parties to the Eastern Conference Area Truckaway and Driveaway Agreement (Agreement).

The obvious controversy that developed was whether the Agreement required that the Eastern drivers hired by M & G receive credit for their years of employment at Eastern and thus be integrated in a new M & G seniority board ("dovetailing"), or receive no recognition for this service (and placed at "the bottom of the board"). M & G opposed dovetailing because it would boost the cost of fringe benefits, since such contract provisions as pension and vacation benefits are based on years of employment. The employees were antagon-

ists, not only because layoffs would be based on seniority, but because a driver's place on the board determines the nature of the daily job assignment and whether or not it is a profitable job.[1]

The Agreement provided that in the event of an absorption or merger the seniority of the employees affected would be determined by the employer and the unions involved, and if no agreement could be reached, the grievance procedure would be utilized. Under the grievance machinery, it was provided that if disputes could not be settled at the local level between union representatives and the company, the matter would go before the Joint Committee. This Committee was made up of equal numbers of unions and employers who were parties to the multi-employer, multi-union understanding, and a decision by a majority was declared "final and binding on all the parties involved". There was also a provision for arbitration if the Joint Committee deadlocked.

At the 1964 hearing before the Joint Committee, Local 107 took a neutral position. The Joint Committee ruled there was no absorption or merger and, there-

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[1] In 1964 at the time of the sale, there were 40 active Eastern drivers and 50 active M & G employees. As was noted in *Price* v. *Int'l. Brotherhood of Teamsters, Etc.*, 457 F. 2d 605, 607 (C.A. 3, 1973):

> Whether an employee is placed at the bottom of the seniority list or "dovetailed" into it is important to over-the-road drivers in establishing the order of job selection. Different runs take place at different hours and on different days. While some jobs may give a man a semblance of a nine-to-five day, others require working at odd hours and on an irregular pattern. Of equal importance, the different runs often draw different schedules of pay. Men lower on the list may not approximate the income of men near the top. Finally, those at the bottom of the list may have no regular jobs at all. They are the members of the "extra board" whose income will vary and depend on the amount of traffic the trucking firm carries.

fore, M & G had no duty to recognize the seniority requests of the former Eastern drivers. This holding was affirmed by the District Court in an unreported decision but reversed by the Third Circuit (App. D, *infra,* pp. 13a-34a). The Court of Appeals held that the hearing procedure before the Joint Committee was plainly inadequate and that the Joint Committee's decision that there was no absorption or merger was plainly unreasonable. (*Id.*, at pp. 25a-30a). The Court then referred the matter back to the Joint Committee.

The second Joint Committee hearing was held on July 17, 1968.[2] The Joint Committee again declared there was no absorption or merger, and the District Court reversed (App. E, *infra,* pp. 34a-39a), wondering whether "the Joint Committee misinterpreted the Court of Appeals' decision or attempted to avoid it". (*Id.,* at p. 38a).

The Joint Committee delayed holding another hearing until January 13, 1971, and when this decision issued, it, too, was reversed by the District Court (App. F, *infra,* 40a-45a).[3] The fourth hearing by the Joint Committee was held on April 10, 1973. Petitioners essentially presented their arguments for dovetailing without the assistance of Local 107, since Louis Bottone, president of the union, did not arrive until well

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[2] Local 107 continued to represent petitioners even though some time in 1967 a new local, 326, was given a charter for the Wilmington area (previously, Local 107 was the bargaining agent for employees located in Wilmington). Local 326 has remained neutral throughout, but was made a party defendant in 1973 pursuant to a motion of M & G.

[3] Though Local 107 was ostensibly supporting petitioners, counsel for the union argued before the District Court that the Joint Committee decision was valid, a position in direct conflict with that taken by petitioners.

after the luncheon recess. Bottone indicated he was not too familiar with the case; urged that there be dovetailing because it was fair; offered no rationalization or explanation in support of his proposal, though he did state he knew of instances of dovetailing as far back as 1957 or 1959; indicated he would be happy to leave the hearing immediately if he didn't have to worry about a lawsuit; and that he was opposed to damages for petitioners—at least if Local 107 had to pay. On April 20, 1973, the Joint Committee awarded bottom of the board to petitioners, thereby depriving them of credit for their years of service with Eastern (App. C, *infra*, pp. 7a-12a). This time the District Court approved the Joint Committee's decision (App. B, *infra*, pp. 2a-6a), and the ruling was affirmed by the Third Circuit (App. A, *infra*, p. 1a).

It is to be noted that at the time of the second hearing in 1964 there were 110 drivers employed at M & G—20 more than were actively working for *both* Eastern and M & G in 1964. (Of the 110, 28 were former Eastern drivers.) At the time of the 1971 hearing, there were 88 active drivers, though there was testimony that M & G had gone as high at 140 employees. On April 10, 1973, when the fourth Joint Committee hearing was held, the January 1973 seniority board indicated there were 106 drivers, *and some 55 percent* of these workers had been hired after the 1964 transaction between Eastern and M & G. (There was also testimony that M & G had 118 employees in April 1973.)

REASONS FOR GRANTING THE WRIT

1. Given the fact that the Joint Committee's decision on petitioners' grievance ordinarily may not be reviewed on the merits by the judiciary, *General Driv-*

ers, Warehousemen and Helpers, Local 89 v. *Riss and Co., Inc.*, 372 U.S. 517, 83 S.Ct. 789 (1963), the Court of Appeals' refusal to apply the duty of fair representation to the union members of the Joint Committee means that the Third Circuit has failed to appreciate the import of this Court's statement that this duty "has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of Federal labor law". *Vaca* v. *Sipes*, 386 U.S. 171, 182, 87 S. Ct. 903, 912 (1967). Or, to paraphrase this Court's analysis in *Humphrey* v. *Moore*, 375 U.S. 335, 347, 84 S. Ct. 363, 370 (1964), unless the duty of fair representation is applied as a restraint to arbitrary or discriminatory conduct by the Joint Committee, the duty "would be effectively emasculated".[4]

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[4] Feller, "*Vaca* v. *Sipes:* One Year Later," 21st N.Y.U. Conf. on Labor, p. 167 (1968):

> Contrary to the assumption of the courts that have since decided cases, the court [in *Vaca*] did not say that the union was liable only if it acted in bad faith or for improper reasons. In briefing and arguing the case we emphasized heavily the language in *Humphrey* that the union should be free of any further review so long as it "took its position honestly, in good faith, and without hostile discrimination." We emphasized the Court's statement in *Huffman* that the union must be given a wide range subject to "complete good faith and honesty of purpose in the exercise of its discretion." We stayed away from the word "arbitrary" like the plague. But the Court did not. Again and again it used phrases such as "arbitrary, discriminatory, or in bad faith." [n. omitted].

See also, *Griffin* v. *Int'l. United Automobile Etc.*, 469 F.2d 181, 183 (C.A. 4, 1972) ("The repeated references in *Vaca* to 'arbitrary conduct reflected a calculated broadening of the fair representation standards."); *Zalejko* v. *Radio Corp. of America*, 236 A. 160, 163 (N.J., 1967).

Half the panel of the Committee, as the Agreement specifically provides, are union representatives.[5] These panel members are there to reach an "acceptable grievance settlement", *Humphrey* v. *Moore, supra,* 375 U.S. at 352, 84 S. Ct. at 363 (Concurring Opinion), and since they decide the employees' rights under the Agreement, they act as trustees and must be held to a standard of "good faith and fair dealing". *Trailmobile Co.* v. *Whirls,* 331 U.S. 40, 68, 67 S. Ct. 982, 996 (1947) (Dissenting Opinion). Accord, *Hughes Tool Co.* v. *NLRB,* 147 F.2d 69, 74 (C.A. 5, 1945). As was said in *Steele* v. *Louisville & N.R. Co.,* 323 U.S. 192, 199, 65 S. Ct. 226, 230 (1944): "The use of the word 'representative' . . . plainly implies that the representative is to act on behalf of all the employees . . . it undertakes to represent." See also, *Nedd* v. *United Mine Workers of America,* 400 F.2d 103 (C. A. 3, 1968). To put it another way, since the panel has the same plenary power over union members as does the union,[6] the rationale which established the duty of fair representation, conceived in *Steele, supra,* and very much alive as *Vaca, supra,* attests, must be made to cover decisions of the Joint Committee.

After all, the law must "reflect the realities of industrial life", *Humphrey* v. *Moore, supra,* 375 U.S. at

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[5] Feller, "A General Theory of the Collective Bargaining Agreement," 61 Cal. L. Rev. 663, 837 (1973): "However great the separation between the particular employer involved and the employer representatives on the joint committee they are still employee representatives. There certainly should be no doubt that the Teamsters Union representatives who sit on the joint committees are representatives of the union, not neutrals."

[6] Decisions must be by majority vote and therefore, the union members of the panel control every decision. They are clearly holders of a monopolistic trust.

353, 84 S. Ct. at 375 (Concurring Opinion). Substance prevails over form. The Court of Appeals ignored the fact that the Joint Committee decision was nothing more than a grievance settlement and that the union members on the panel have the duty to represent the employees. Thus, the lower court's ruling conflicts with the large body of case law that holds the duty of fair representation extends to the settlement of grievances as part of the administration and enforcement of the collective bargaining agreement. *Vaca* v. *Sipes, supra,* 386 U.S. at 185, 87 S. Ct. at 914; *Conley* v. *Gibson,* 355 U.S. 41, 45, 78 S. Ct. 99, 102 (1957); *Macklin* v. *Spector Freight Systems, Inc.,* 478 F.2d 979, 989-990 (C.A.D.C. 1973); *Day* v. *United Automobile Aerospace and Agricultural Implement Workers of America, Local 36 of UAW,* 466 F.2d 83, 89 (C.A. 6, 1972); *Bazarte* v. *United Transportation Union,* 429 F.2d 868, 871-872 (C.A. 3, 1970); *Mandel* v. *Highway and Local Motor Freight Drivers, etc.,* 246 F. Supp. 805, 808 (D.S.D.N.Y., 1964).

Nor do practical considerations stand in the way of this approach. We are not asking that the Joint Committee system be dismantled, but simply, that these decisions, like any determination within the control of a union and the attendant possibility of a § 301 suit, be subject to the duty of fair representation. Only then will it be ensured that Joint Committees everywhere will "make an honest effort to serve the interests" of all the employees that they represent. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 337, 73 S. Ct. 681, 686 (1953).

2. The Court of Appeals' decision to affirm the Joint Committee's ruling that there be no dovetailing of the seniority board was not based on relevant differences but on arbitrary distinctions not permitted under the principle in *Humphrey* v. *Moore, supra,* 375 U.S.

at 347, 84 S. Ct. at 371, that integration of seniority rights "is a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger or an absorption such as occurred here" [n. omitted].

A review of the record requires the conclusion that the sole basis for the decision was that the M & G drivers were employed by the absorbing company and petitioners were employed by the absorbed company. But Eastern was not insolvent or bankrupt at the time of the 1964 transaction; rather, it was a going concern with a substantial amount of business—business that was automatically transferred over to M & G. The consolidation, therefore, meant more jobs were available at M & G; why not dovetail, then? Indeed, since the 1964 sale, the record shows the work force at M & G had at least doubled, sometimes was three times what it had been in 1964, and that in 1973 *more than half* of the drivers on the M & G seniority board were hired *after* the 1964 sale. Under these circumstances, the failure to integrate the two seniority lists produced an obvious inequity—M & G drivers obtained a windfall at the expense of the Eastern employees. Kennedy, "Merging Seniority Lists, 16th Annual Meeting of National Academy of Arbitrators," BNA, p. 9 (1963)[7]

The decision by the Third Circuit also conflicts with the rule that seniority rights, which have accrued over

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[7] See also, Kahn, "Seniority Problems in Business Mergers," 8 Ind. and Lab. Rel. Rev., 361, 368 (1954-1955), quoted with approval in *Humphrey* v. *Moore, supra,* 375 U.S. 347, 84 S. Ct. at 371, at n. 10: "Such equities are most likely to be overriden when members of a numerically dominant group find in a merger an opportunity to gain in seniority status at the expense of the merged minority."

the years, may not under these circumstances be destroyed retroactively. *Elgin, J. & E Ry. Co.* v. *Burley,* 325 U.S. 711, 739, 65 S. Ct. 1282, 1297 (1945), decision after rehearing, 327 U.S. 661, 60 S. Ct. 721 (1946); cf. *Kent v. Civil Aeronautics Board,* 204 F.2d 263, 266 (C. A. 2, 1953), *cert. denied,* 346 U.S. 326, 74 S. Ct. 46 (1953) ("the paramount public interest required that due consideration be given conflicting seniority interests of both groups . . .").

Of substantial significance, too, is that by 1973 the practice in the industry when two solvent companies merged was to dovetail the seniority boards; that the 1968 decision by the Third Circuit (App. D, *infra,* pp. 23a-25a) made clear that there were numerous provisions in the Agreement that protected the seniority rights of *all* employees affected by a merger or absorption; that the lower court directed the Joint Committee to give "due attention for the scheme of this contract" (*Id.,* at p. 24a); and that the Third Circuit declared that one form or another of dovetailing would be the only decision to satisfy the stated requirement that there be a rational decision (*Id.,* at p. 30a). Therefore, the 1974 ruling by the lower court approving the decision not to dovetail conflicts with this Court's admonition that courts must refuse to enforce an interpretation of a contract when the essence of the decision is not drawn from the agreement, *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.,* 363 U.S. 593, 597, 80 S. Ct. 1358, 1361 (1960), and also conflicts with the Third Circuit's refusal in 1974 to apply the law of the case. *United States* v. *Hoffa,* 402 F.2d 380, 387 (C.A. 7, 1968), *cert. denied,* 400 U.S. 1000, 91 S. Ct. 455 (1971); *White* v. *Murtha,* 377 F.2d 428, 431 (C.A. 5, 1967).

3. The requirement of procedural due process implicitly recognized in *Humphrey* v. *Moore, supra,*—that is, two sets of drivers battling for seniority rights and the absorbing company remaining neutral—was violated in the case at bar.

Here, the fight was not carried on in a fair way. The employer members of the panel are protecting M & G's interests and urging that it be held that petitioners be sent to the bottom of the board. The union members, though, cannot really put up a good show against the unified front of the employer agents because the union members find themselves in the impossible position of having to accommodate the clashing desires of both M & G and the Eastern drivers. Thus, in the context of unified employer opposition to dovetailing and the fact that only the vote of one union representative (plus the employer ballots) was necessary, the chances of petitioners were doomed. Essentially, then, the Eastern employees stood alone and had no chance of winning—as four decisions by the Joint Committee poignantly demonstrates. This is, very simply, a violation of procedural due process, and the Court of Appeals' imprimatur to this stacked deck runs counter to the underlying assumption in all of the Supreme Court decisions on the finality of arbitration-grievance decisions that the decision-maker will be impartial.

The chances of petitioners winning their long battle was even less likely because their union, Local 107, handled the grievance in a lackadasical fashion. The approval by the Court of Appeals of the representation given by Local 107 runs counter to the requirement that grievances not be handled in a perfunctory manner if the duty of fair representation is to be satisfied.

Vaca v. *Sipes, supra,* 386 U.S. at 194, 87 S. Ct. at 917; *Retana* v. *Apartment, Motel, Hotel & Elevator Operators Union, Local No. 14,* 453 F.2d 1018, 1024 (C.A. 9, 1972); *De Arroyo* v. *Sindatico De Trabjadores Packing,* 425 F.2d 281, 283-285 (C.A. 1, 1970).

This case reveals union representation at its worst: inarticulate comments, arguments made without support or justification; no attempt to present the windfall theory or that the scheme of the Agreement required dovetailing; no thoughtful analysis of the Third's Circuit's crucial 1968 decision; the failure to supply experienced and knowledgeable representatives; no in-depth analysis of the past practice of dovetailing in the industry; opposition to damages; and the lawyers of Local 107 supporting a Joint Committee decision that petitioners were attacking. Surely, this Court will not countenance such egregious behavior.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1974

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1882

LAWRENCE E. BIESKI, et al, *Appellants,*

v.

EASTERN AUTOMOBILE FORWARDING COMPANY, INC., M & G CONVOY, INC., and HIGHWAY TRUCK DRIVERS AND HELPERS, LOCALS 107 and 326, Unincorporated Associations Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and EASTERN CONFERENCE AUTOMOBILE TRANSPORTERS JOINT COMMITTEE, *Appellees,*

and

JOSEPH A. SOCKLOSKY, et al., Acting on Their Own Behalf of Approximately Eighty-one Other Drivers Presently Employed by M & G Convoy, Inc., *Intervenors.*

Appeal From the United States District Court
For the District of Delaware

Argued May 30, 1974

Before KALODNER, ROSENN and HUNTER, *Circuit Judges*

Judgment Order

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By the Court,

James Hunter, III, *Circuit Judge*

Attest:

Thomas F. Quinn, Clerk

Date: June 11, 1974

APPENDIX B

Memorandum Opinion

WRIGHT, CHIEF JUDGE.

This suit originated out of the January 15, 1964 purchase of certain of the assets of the defendant Eastern Automobile Forwarding Co., Inc. (Eastern) by the defendant M & G Convoy, Inc. (M & G) and the ensuing decision by the defendant Eastern Conference Automobile Transporters Joint Committee (Joint Committee) concerning the seniority rights of the former Eastern drivers under the provisions of their collective bargaining agreement. All of the drivers of both companies were represented by the defendant Highway Truck Drivers and Helpers, Local 107, affiliated with the Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 107), and all defendants were parties to the multi-employee and multi-union collective bargaining agreement. The Eastern Conference Area Truckaway and Driveaway Agreement (Agreement). Subsequent to the transaction, a dispute arose regarding the respective seniority and job status of the M & G and Eastern drivers under the Agreement. The dispute was submitted to the Joint Conference which rendered its decision that pursuant to the provisions of the Agreement, M & G had neither acquired, purchased nor merged with Eastern, that the Joint Committee was not empowered to determine the seniority issues pursuant to the sections of the Agreement applicable to the acquisition or absorption situation, and that M & G was under no obligation to recognize any seniority or job status claim of the former Eastern employees.

In response to this decision and pursuant to § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), the plaintiffs filed their complaint charging that Eastern, M & G and Local 107 had conspired to deprive them of their seniority rights by unfairly influencing the Joint Committee's decision, that Local 107 had breached

its duty of fair representation during the proceedings before the Joint Committee and that the decision of the Joint Committee was arbitrary and made without benefit of a fair hearing. The plaintiffs sought the issuance of an injunction against the enforcement of the decision and an order that M & G admit former Eastern employees to a seniority status comparable to that of its own employees.

This Court, in denying the plaintiffs' request for a preliminary injunction [1] and again in granting the defendants' motion for summary judgment,[2] concluded that because of the terms of the Agreement, it had no power to reverse the Joint Committee decision absent substantial evidence of fraud or deceit on the part of the defendants which would vitiate or nullify the Joint Committee's action, or substantial evidence of a lack of good faith or honesty of purpose on the part of Local 107 in its exercise of its duty of fair representation. Finding no such substantial evidence, the Court held for the defendants.

On appeal, the Third Circuit ruled that this Court had too narrowly construed the scope of its authority to review decisions of the nature of the one rendered by the Joint Committee. It held that when the decision is "a jurisdictional one—that a certain dispute will not be considered on its merits by the private decision-maker—then the court is a proper forum to review this decision on the basis of its analysis of the contract entered into by the parties," 396 F.2d at 38. Concluding that under the terms of the Agreement M & G had absorbed Eastern, the Circuit Court held that the Joint Committee should have proceeded to determine the seniority dispute under the appropriate Agreement sections, and remanded the case for further proceedings before this Court and the Joint Committee.

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[1] 231 F.Supp. 710 (D. Del. 1964) affirmed 354 F.2d 414 (3rd Cir. 1965).

[2] Opinion, August 2, 1967, reversed 396 F.2d 32 (1968).

Subsequently, on two occasions, the Joint Committee issued decisions purporting to comply with the directive of the Circuit Court and the orders of this Court concerning the resolution of the seniority issues. Neither decision met either mandate, and on March 2, 1973, this Court once again ordered that the Joint Committee hear and determine the seniority rights of the Eastern employees as a consequence of M & G's absorption of Eastern. On April 20, 1973, the Joint Committee rendered its fourth decision regarding this question.

The case is presently before the Court on the motion of M & G for an order enforcing the Joint Committee's most recent decision. In essence, M & G is desirous of a prompt determination by the Court of whether the Joint Committee has finally complied with the orders of this Court and properly assumed jurisdiction over and decided the seniority issues raised as a consequence of M & G's absorption of Eastern which the Third Circuit held were before the Joint Committee under the Agreement. Although of a somewhat unusual nature, M & G's request for immediate review of the Joint Committee decision is certainly understandable given the rather tortured path of this litigation.

In light of this factor and the obvious difficulties confronted by M & G in attempting to observe the directives of the Joint Committee under its contractual obligations as well as the orders of this Court, the Court is of the opinion that it should entertain M & G's motion and review the Joint Committee's decision to determine its compliance with the orders directing it to decide the seniority issues raised in this action. The plaintiffs have raised twenty-two specific objections to the latest decision, and the Joint Committee has filed its response to these objections.

Having reviewed the Joint Committee decision of April 20, 1973, the Court concludes that the Joint Committee did assume jurisdiction over and decide the seniority issues raised by the plaintiff pursuant to the Agreement in com-

liance with the orders of January 7, 1971 and March 2, 973, and in accordance with the procedure delineated in he Agreement. Therefore, the review of the merits of the lecision is limited to cases of fraud, deceit and breach of a luty of fair representation. These issues have been decided previously, and the plaintiffs have submitted no additional evidence to alter the Court's prior determinations.[3]

The objections raised by the plaintiff are primarily directed to the Joint Committee's evidentiary findings. Therefore, the objections are not pertinent to the jurisdictional question central to the Third Circuit's opinion and this Court's orders, but rather involve the merits of the Joint Committee's consideration and determination of the seniority issues committed to it by the Agreement. Certain of the objections do, however, require brief discussion.

The plaintiffs' first objection concerning the question of the seniority status of M & G employees hired after the absorption has some apparent merit in light of the statement cited from the Court's opinion of March 2, 1973, that the seniority status of these employees was not properly before the Joint Committee. However, the objection misperceives the Court's concern regarding this question. In its January 25, 1971 decision, the Joint Committee had considered subsequent hires and their employment seniority as a component of the underlying determination of the seniority of former Eastern drivers as a consequence of the absorption. This was countenanced neither by the Agreement nor the orders of the Court. In the latest decision, the Joint Committee evidently considered and resolved the threshold seniority issue as of the date of the absorption. Its subsequent determination of the status of post-absorption employees did not violate the Court's orders and quite clearly was a necessary element of the resolution of the entire controversy in light of the intervening years and circumstances. See 396 F.2d at 42.

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[3] See cases cited in footnotes 1 and 2.

The plaintiffs' objection regarding the rights and status of any former Eastern drivers who may have voluntarily terminated employment with M & G has been satisfactorily answered by the oral and written representations of counsel that such cases will be decided individually by the Joint Committee and that persons who terminated employment because of their seniority status are not covered by the challenged provisions.

Finally, the plaintiffs' objection dealing with the Joint Committee's alleged failure to decide the seniority issue The Court has frequently stated its interpretation of that phase as employed in its January 7, 1971 order, and the Joint Committee's decision is in compliance with that interpretation.

The Court has purposely briefly reiterated the history of this controversy to illuminate the issues presented and the parameters of its review. The plaintiffs have repeatedly requested that the Court undertake either a comprehensive review of the merits of the Joint Committee decision or that it determine the seniority issues. The Court has consistently refused either course and has limited its efforts to insuring that the Joint Committee fulfill its contractual obligations by assuming jurisdiction over the seniority dispute. This having been accomplished, the Court has no further power of review in this controversy.

For the reasons stated above, the motion of M & G for an order enforcing the arbitration award for compliance with the prior orders of this Court is granted.

Submit order.

APPENDIX C

EASTERN CONFERENCE AUTOMOBILE TRANSPORTERS
JOINT COMMITTEE

Docket No. 437

IN THE MATTER OF THE DISPUTE BETWEEN

TEAMSTERS LOCAL #107, Philadelphia, Pa.
and
M & G CONVOY, INC.

Decision

HEARING: April 10, 1973 (Iron Hill Inn, Newark, Delaware)
DECISION: April 20, 1973 (Bethesda, Maryland)

The Committee held a hearing on April 10, 1973, at the Iron Hill Inn, Newark, Delaware, and heard evidence and arguments from all of the parties concerned. Thereafter, the Committee met on Friday, April 20, 1973, and after thoroughly reviewing the evidence produced in the four hearings, as well as the court proceedings, a motion was made duly seconded and carried as follows:

It is recognized that this fourth hearing is held pursuant to an Order by Judge Caleb M. Wright, dated March 2, 1973. Judge Wright enjoined the parties from giving any effect to the previous decision of the Committee, dated January 25, 1971. In remanding this case to the Committee, the Court noted three issues:

(1) The seniority rights of the plaintiffs as of the date of the absorption by M & G of Eastern's business in January 1964;

(2) The resolution of the question of fringe benefits for the plaintiffs who were former Eastern employees; and

(3) The question of damages.

In effect, the Court held that M & G did absorb Eastern. Accordingly, the seniority dispute must be resolved in the

light of that conclusion of the Court. In addition to the issues specified by the Court, there are also questions of whether the Committee's decision should apply to all former Eastern employees, and the effect of previous offers of employment.

In January 1964, M & G offered to dovetail all of the employees based on their terminal seniority, pending a decision of the Committee. The employees themselves strongly resisted this approach and the result was that M & G established one seniority list for its employees and one seniority list for the former Eastern employees until such time as the Committee ruled. Subsequent to the Committee decision, M & G hired certain of the Eastern employees as new employees, but this employment was not required by the Committee's decision. It is noted that in the original hearing the Eastern employees were not in favor of so-called dove tailing, but through their spokesman suggested that the Committee "flip a coin" to resolve the seniority issue.

At the hearing on April 10, 1973, the facts reveal that originally there were some 52 Eastern employees. Of this group, 24 were involved in the court action. Subsequently, five dropped out of the court case, an additional individual died, and one retired. Of the 17 indiivduals remaining, 12 were employed by M & G and five were employed elsewhere. The Bieski group argued that only the 19 remaining plaintiffs, including the one who died and the one who retired, should receive any benefits from the Committee on the grounds that all other employees lost their rights by not pursuing the lawsuit. M & G agreed with this position of the Bieski group, but noted that it had actually hired 22 Eastern employees. Several of the Eastern employees who were not involved in the litigation testified that it would be unfair for the Committee to treat them differently than the Bieski group. The Committee concludes that the fairest approach is to treat all Eastern employees in the same manner for the purposes of seniority and hiring; however, for pur-

poses of damages, including pensions, only the plaintiffs shall be entitled to any relief.

M & G presented evidence that pursuant to the Committee's decision on January 25, 1971, it offered employment to all Eastern employees who were not employed by M & G. Accordingly, M & G contends that it has no further obligation to the Eastern employees who rejected the offer of employment. The problem with this argument is that the Eastern employees may have rejected employment because their seniority rights were inferior to their former fellow employees who were working for M & G since 1964. Accordingly, the Committee concludes that in order to avoid any further confusion or speculation, M & G shall be required to offer employment to all former Eastern employees, except that M & G will not be required to offer employment to any Eastern employee who terminated employment with M & G for reasons such as a voluntary quit, retirement, discharge for cause, promotion out of the bargaining unit, or death.

Various contentions were made concerning the issue of seniority. The Bieski group argued that the court decision required dovetailing, and that dovetailing can only mean that both groups of employees must be credited with their total years of seniority with both companies. The Bieski group suggested that this meant integrating the two seniority lists based on over all seniority with both companies, or slotting the men in on a one for one basis. The Committee has read the transcript of the proceeding before Judge Wright, together with the Court's decision, and is convinced that the reference to dovetailing by the Court does not in any way restrict the decision of the Committee or deprive the Committee of the power to make its decision based on all of the facts.

The collective bargaining agreement made no reference to the seniority application. Further, there was no precedent under this contract for how the employees of an

absorbed company should be treated. Mr. Bottone of Local 107 contended, as did his predecessor, Mr. Cassidy, that the employees should be dovetailed in accordance with their over all seniority with both companies. Cassidy admitted that there was no consistent practice in the freight industry in the area, and he cited several examples where the employees went to the bottom of the seniority list in the freight industry. The Committee takes note of the fact that in addition to the testimony, the many court cases involving the Philadelphia area and vicinity reveal that in absorptions or purchases the purchased company's employees went to the bottom of the purchasing company's seniority list. This practice continued with some exceptions until 1969, when, for the first time, the employers and unions in the freight industry agreed on a policy of dovetailing based on over all seniority.

In the car haul industry, the only case referred to prior to 1964 in which there was dovetailing based on over all seniority was the M & G purchase of Great Lakes. That case arose in Buffalo, and was decided under another contract in the Central States area. In that case, the employees were dovetailed based on over all seniority in the circumstances where M & G bought the Great Lakes Company. M & G argues that it never bought Eastern and that even under the present 1973 contract the employees would go to the bottom of the seniority list.

In this case there was a good deal of argument presented by the various employees as to how the seniority resolution should be handled by the Committee. The M & G employees argued that they should not be penalized because Eastern went out of business. Based on all of the evidence, and under all of the circumstances, the Committee decides that the Eastern employees shall go to the bottom of M & G's seniority list as of January 1964, when M & G hired the first Eastern employees. The relative seniority of the former Eastern employees shall be based upon their position

on the Eastern seniority list. All of the former Eastern employees who are employed by M & G shall be placed ahead of new hires, that is, employees who never worked for Eastern and were hired on or after January 1964 by M & G. The former Eastern employees who are or become regular bona fide employees of M & G shall have seniority with M & G as of January 1964 for all purposes, except vacations. These Eastern employees will be credited with the seniority they enjoyed at Eastern in 1964 for future vacation benefits.

For purposes of pensions, M & G shall be responsible for insuring that any of the plaintiffs in its employ, or whom it shall employ pursuant to this decision, shall be credited for all time between January 1964 to date as if he had in fact been employed by M & G. The purpose of this crediting is to insure that these plaintiffs receive continuity of employment for purposes of pension credits. This requirement shall not require M & G to credit any of the plaintiffs for time involved after his employment has been terminated for such reasons as voluntary quit, retirement, discharge for cause, promotion out of the bargaining unit or death.

The question of damages is a difficult one. The Committee is impressed by the fact that M & G has complied with each and every decision of the Committee since 1964. M & G was not opposed to dovetailing the Eastern employees into the M & G seniority list. However, the Committee decision in 1964 did not require such hiring or dovetailing. The Committee finds that M & G acted in good faith and not in derogation of its obligation under the contract. Accordingly, the Committee determines that M & G shall not be liable for back pay or any other damages, except to the extent specified above, provided that it rearranges its seniority list in accordance with this decision and offers employment to Eastern employees based on this decision. Said offer by M & G shall be made in writing within two weeks of this decision, and the individuals involved shall be given two weeks to report for work.

In summary, the Committee concludes that:

(1) All former Eastern employees shall be treated alike, except for the issue of damages;

(2) M & G must offer employment to Eastern employees who were not employed by M & G;

(3) The Eastern employees employed shall go to the bottom of the M & G seniority list as of January 1964, when M & G first hired Eastern employees, but ahead of new hires who were hired after January 1964;

(4) All Eastern employees who are or become employees of M & G shall retain their Eastern seniority for future vacation benefits;

(5) The 19 Eastern employees, who are plaintiffs in the present case and who are or become bona fide employees of M & G, shall receive credit for pension benefits as if they had been employed by M & G;

(6) No employee shall receive any back pay or damages, except as specified above.

Any alleged violation or question of interpretation of this decision shall be subject to further review by this Committee.

Dated this 20th day of April 1973.

APPENDIX D

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT.

LAWRENCE E. BIESKI ET AL.

v.

EASTERN AUTOMOBILE FORWARDING COMPANY, INC., M & G Convoy, Inc., and Highway Truck Drivers and Helpers, Local 107, an Unincorporated Association Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Eastern Conference Automobile Transporters Joint Committee

and

Joseph A. Socklosky, Adam Dorosky and William Greenly, Acting on Their Own Behalf and on Behalf of Approximately Eighty-one Other Drivers Presently Employed by M & G Convoy, Inc., Intervenors

LAWRENCE E. BIESKI ET AL., Appellants.

No. 16954.

Argued March 7, 1968.

Decided May 29, 1968.

Rehearing Denied June 27, 1968.

Opinion of the Court

* * * * *

VAN DUSEN, Circuit Judge.

[1] This appeal is from an order of the District Court granting the defendants-appellees' motion for summary judgment. The underlying controversy in this case concerns certain seniority rights under a collectively-bargained labor agreement. There being substantial allegations that the seniority right, if any, arise from such a contract and that

recourse may lie for an alleged breach of the contract, the court has jurisdiction under § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), authorizing District Court jurisdiction of suits for "violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." Humphrey v. Moore, 375 U.S. 335, 341-444, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964); Chasis v. Progress Manufacturing Company, 382 F.2d 773 (3rd Cir. 1967).

The 20 appellants, part of 24 plaintiffs below,[1] were formerly employed by Eastern Automobile Forwarding Company, Inc. (Eastern) a trucking company in the business of hauling new automobiles from the Chrysler Corporation assembly plant in Newark, Delaware. In January 1964, Eastern sold certain of its assets to M & G Convoy, Inc. (M & G), a similar company also hauling Chrysler's automobiles from the Delaware plant. The written agreement of sale provided for M & G to buy Eastern's real estate (two terminal properties) and substantially all of its operating equipment (mainly trucks). By the terms of this instrument, nothing else was transferred, neither goodwill, licenses, accounts receivable, liabilities, cash, nor I.C.C. operating certificate. After the sale, Eastern went out of business.

The appellants, Eastern drivers, finding themselves without employment, contend that they should have been hired by M & G on a basis that allowed them to keep their seniority gained while working for Eastern. They base this contention upon a multi-employer, multi-union, and multi-plant collective bargaining agreement: the Eastern Conference Area Truckaway and Driveaway Agreement (Agreement). The sections of this Agreement that possibly are relevant to this dispute concern seniority and grievance machinery. Article IV, "Seniority," provides in Section 1 that "term-

[1] The suit was originally a class action but was amended prior to the final hearing for a permanent injunction.

inal seniority will be maintained in accordance with the terms of this Agreement." Then, after the listing of seniority classifications, rules, and notice requirements, Section 3 concludes: "Any controversy over the seniority standing of any employee on the Seniority List shall be submitted to the Grievance procedure (Article 6)." Section 4, "Sale, Transfer, Etc.", provides that the Agreement would be binding on any successors or assigns of parties signing the Agreement and that any "purchaser, transferee, lessee, assignee, etc." of "an entire operation, or any part thereof," had to receive notice of the existence of the Agreement. Section 5, "Mergers, Etc.", provides:

> "In the event that the Employer absorbs the business of another private contract or common carrier or is a party to a merger of lines the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the grievance procedure (Article 6)."

Article 6, the "Grievance Machinery," provides that if "disputes and grievances" could not be settled by shop stewards or between local Union business agents and the company, then the dispute should go before a Joint Committee. This Committee, composed of equal numbers of representatives of unions and employers who were parties to the Agreement, was empowered to hear evidence and investigate the facts of a dispute; a decision by a majority was declared "[illegible] and binding on all the parties involved" (Section 3). Section 5 of Article 6 provides for final and binding arbitration if the Joint Committee is deadlocked, and Section 6, "Disputes and Requests for Interpretation," concludes that Article:

> "Unless otherwise expressly provided in this Agreement, any and all disputes, including interpretations of contract provisions, arising under, out, in connection with, or in relation to this collective bargaining agree-

ment shall be subject to the grievance procedure of the Agreement."

[2] Of the unions party to this Agreement, Local 107 [2] represented both the Eastern drivers and those at M & G. Consequently, one group of Union members, appellants here, wanted to be hired at M & G without losing all of their seniority by means of some form of "dovetailing;" [3] the other group of members of the same Local, M & G drivers, did not want to be pushed down their own seniority ladder and insisted that any transferring Eastern drivers go to the "bottom of the board." All parties concerned with this dispute seemed to agree at the outset that Article 4, Section 5, of the Agreement controlled and that the best road to decision was appeal to the Joint Committee. In the interim, the two groups of drivers, Local 107's business agent, and M & G agreed on the temporary solution of separate seniority lists for deliveries to the remaining pre-sale Eastern and pre-sale M & G dealers.

In the eyes of all parties, the seniority dispute turned on the application of Article IV to the terms of the business

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[2] Highway Truck Drivers and Helpers, Local 107, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[3] "Dovetailing" is a labor relations term referring to some system of unifying, on one "board," two previously separate seniority lists. An unlimited number of variations are possible when two groups are combined and at least three general types have been mentioned in this case: (1) "Strict dovetailing," in which the senior man at M & G is followed by the senior man at Eastern, then the second man at M & G and so forth; (2) "sandwiching," a ratio concept, where, after Eastern drivers are compared to M & G's and the ratio determined, the new list might have the senior man at Eastern followed by the first two men at M & G, then the second at Eastern followed by the third and fourth at M & G, and so forth; and (3) "separate boards," not really a type of "dovetailing," in which separate seniority lists are kept for former Eastern routes and dealers and for M & G's routes and dealers.

eal between Eastern and M & G.[4] Before the sale, M & G nd Eastern (both common carriers with geographically co-xtensive I.C.C. operating rights) hauled cars from Dela-are, each to its own group of dealers. Eastern hauled to ew Jersey and parts of New York; M & G hauled to parts Pennsylvania, parts of New England, and parts of New ork not served by Eastern. This division of territory could ot be subject to a written agreement under I.C.C. regula-ons; it was established and enforced by Chrysler on an ral basis. In 1963, Chrysler informed Eastern and M & G nat increased railroad shipping would reduce the business vailable to the truckers. This prompted Eastern's presi-ent and sole shareholder to leave the business and, accord-ngly, he sought a deal with M & G—one firm, but not two, ould profitably survive in the face of the railroad competi-on. The record reveals that there was a meeting between hrysler's Traffic Manager and the presidents of both I & G and Eastern. No one attending that meeting has estified or deposed that an explicit oral agreement was eached that when Eastern sold certain of its assets and vent out of business, Chrysler would give to M & G the ormer Eastern customers. The president of Eastern said hat Chrysler agreed to deliver cars to Eastern up until he day of the sale and that he "nautrally supposed they M & G] would [get Eastern's former business] if they ought the Company [Eastern]." The District Court prop-rly found that "as of January 15, 1964, all cars formerly ransported by Eastern were handled by M & G * * *." 231 F. Supp. 710, at 712.

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[4] Also, it is noted that the mintues of the Joint Committee meeting of January 23, 1964, state in the first paragraph:

> "The issue involved in this Case is the [sic] Union (Local 107) has requested an interpretation of Article 4, Section 5, of Truckaway Agreement, due to the fact of M & G Convoy Company buying out Eastern Auto Forwarding Company. This will involve a problem of seniority status."

At the hearing before the Joint Committee, various Eastern and M & G employees apparently[5] attempted to give their opinion of whether the sale of Eastern real estate and operating equipment was nonetheless an "absorption of business" within Article 4, Section 5, of the Agreement. Local 107's business agent apparently took no argumentative position on the absorption question and merely outlined factually the events of the sale and the M & G drivers' refusal to agree to any dovetailing. M & G's president pointed out that M & G did not buy any I.C.C. rights, capital stock, assets, or liabilities from Eastern other than two of three parcels of real estate and 99% of Eastern's tractors and trailers. He "reiterated that he did not buy any I.C.C. rights from Eastern * * *" No one pointed out that the purchase of such I.C.C. rights would have been illegal and, hence, such reiteration had no significance.[6]

A unanimous decision of the Joint Committee followed, ruling that "there was no corporate *acquisition, purchase, or merger* within the meaning of Article 4, *Section 4 and 5*" [emphasis added] of the Agreement, and, therefore, M & G had no duty under the Agreement to recognize the seniority requests of former Eastern drivers. Dissatisfied with this ruling, certain of the present appellants instituted a class action in the District Court, seeking a preliminary injunction to prevent any effect being given to the Joint Committee's decision. They further asked for a court decision under

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[5] No transcript was kept of the Joint Committee meeting. The record contains summarizing "minutes" of what transpired, plus testimony before the District Court of Various people's recollection of what was said and the accuracy of the "minutes."

[6] It is noted that the Joint Committee chairman, a lawyer who was competent to point out the insignificance of no transfer of I.C.C. rights, remained silent as far as the minutes show. This lawyer's client, M & G, had a financial interest in a finding of no "absorption" under the terms of Article 4, Section 5; see footnote 15, infra.

301(a) of the L.M.R.A. that "dovetailing" should be re-
ired under the contract and that the Eastern employees
rrently denied such dovetailing were entitled to damages
r lost wages. After a lengthy hearing, the District Court
nied any preliminary injunction, Bieski v. Eastern Auto-
obile Forwarding Company, 231 F.Supp. 710 (D.Del.
964), and we affirmed his exercise of discretion, expressly
fraining from giving any opinion on the merits, 354 F.2d
4 (3rd Cir. 1965). During the pendency of this earlier ap-
al, Local 107 changed its counsel and, also changing its
neutral" position taken before the Joint Committee, urged
to reverse the District Court.[7]

On the hearing for a permanent injunction, the appellants
troduced as additional evidence only an affidavit of the
anagement lawyer who headed the Joint Committee the
y of the hearing,[8] and the present appeal is from an order
anting the defendants' cross-motion for summary judg-
ent.[9]

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[7] Local 107's change of position prompted the reargument held
the first appeal.

[8] This affidavit, held irrelevant to the decision by the District
urt, showed that the Committee co-chairman presiding at the
aring, Carney D. Matheson, was also a lawyer for both Eastern
d M & G. The Joint Committee Rules show that his presiding
as according to Rule 4, which provided that the Union and em-
oyer co-chairmen would alternate as Acting Chairman at each
eeting. The affidavit also showed that Mr. Matheson also pre-
ler over the Joint Committee whose decision was later challenged
asuccessfully in Humphrey v. Moore, supra.

[9] After our affirmance of the denial of a preliminary injunction,
e District Court allowed representatives of the M & G em-
oyees and the Joint Committee to intervene as parties defendant.
he District Court, in granting summary judgment for the de-
ndants-appellees, decreed "it appropriate to do no more than
affirm its opinion of July 16, 1964, as reported at 231 F.Supp.
0, adopting the facts and conclusions of that opinion, and incor-
rating them by refeernce herein."

The precise question presented on the "merits" of this action is whether the Federal Courts can reverse the decision of a Joint Committee which has acted pursuant to a labor agreement, one section of which declared that the Joint Committee's decision would be "final and binding." On this record and in light of the recent Supreme Court decision in Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), we affirm the conclusion of the District Court that the appellants failed to show a breach of the duty of fair representation sufficient to allow the courts to interfere on that basis with the agreed-upon private determination of a labor dispute. Such a conclusion, however, does not dispose of the matter.

The Supreme Court decision in Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363 (1964), dealt with a dispute closely analogous to the one at bar. In that case, the Joint Committee had determined a seniority "sandwiching" under a labor agreement almost identical to the Agreement in the present case. The Kentucky Court of Appeals, reversing the state court's denial of an injunction, granted a permanent injunction against giving any effect to the Joint Committee's decision and the Supreme Court reversed, holding that the dissatisfied employees seeking the restraint of the Joint Committee decision had not proved their case:

> "The decision of the committee, reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is. General Drivers, etc., Union v. Riss & Co., 372 U.S. 517, 83 S.Ct. 789, 9 L.Ed.2d 918." 375 U.S. at 351, 84 S.Ct. at 372.

Humphrey v. Moore, therefore, presents the obverse situation to the case at bar. But the approach of the Supreme Court in reversing the Kentucky court offers guidelines for our decision.

I.

[3] Under present Supreme Court decisions, the prominent labor policy of encouraging private settlement of disputes militates against court review of such private deci-

ons except in the narrowest of circumstances.[10] The appel-
nts argue that the present case falls outside the general
ıle of these cases prohibiting court review absent fraud
nd deceit. (This was the standard used by the District
ourt. 231 F.Supp. at 716.) The "fraud and deceit" stand-
rd, they argue, is proper only in "arbitration" cases. As
uthority they cite Humphrey v. Moore, 375 U.S. at 345-
48, 84 S.Ct. 363, where the Joint Committee's decision
as found "reasonably concluded" and "neither unique
or arbitrary." Appellants also point out that the "arbitra-
on" cases [11] were not cited in Humphrey v. Moore and
rgue that the omission is significant.

[4] We do not think that such a conceptual distinction
etween court review of arbitration and committee deci-
ions is necessarily appropriate under federal labor law.
Rather, with the specific labor agreement as a necessary
tarting point, the question of judicial review of a "final"
rivate decision should turn on the adequacy of that private
ecision under the contract in terms of the controversy pre-
ented.[12] If the court is convinced both that the contract
rocedure was intended to cover the dispute and, in addi-
ion, that the intended procedure was adequate to provide a
air and informed decision, then review of the merits of any
ecision should be limited to cases of fraud, deceit, or in-
tances of unions in breach of their duty of fair representa-
ion.

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[10] United Steelworkers of America v. American Mfg. Co., 363 U.S. 574, 578, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 93, 596, 80 S.Ct. 1358, 4 I.Ed.2d 424 (1960); General Drivers, tc., Union v. Riss & Co., 372 U.S. 517, 519, 83 S.Ct. 789, 9 L.Ed.2d 18 (1963); Republic Steel Corp. v. Maddox, 379 U.S. 650, 653, 5 S.Ct. 614, 13 L.Ed.2d 580 (1965).

[11] See the *Steelworkers* "trilogy," ibid.

[12] See Rothlein v. Armour & Company, Inc., 391 F.2d 574 (3rd Cir., 3/26/68).

If, however, the private decision complained of is a "jurisdictional" one—that a certain dispute will not be considered on its merits by the private decision-maker—then the court is a proper forum to review this decision on the basis of its analysis of the contract entered into by the parties. John Wiley & Sons v. Livingston, 376 U.S. 543, 546-547, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964). This is particularly true where the court is convinced that a private procedure used for the determination is not adequate to decide fairly and fully such an important initial question. Rothlein v. Armour & Company, Inc., supra.

II.

Turning thus to the Agreement, the central question is what provisions govern this seniority dispute. The Supreme Court in Humphrey v. Moore raised this precise problem of the contractual authority for the Joint Committee's decision, but never decided the dispute over this issue since, in their view, regardless of the section applicable, the Committee's decision was reasonable. In this case, this problem of authority is hotly contested.

The appellants argue that any authority given to the Joint Committee must be found in Article 4, Section 5. If there is an absorption, the Joint Committee has jurisdiction of the merits. The Committee found that it had no jurisdiction to proceed further when it found no absorption. Under this view, it is concluded, the Joint Committee decision being "jurisdictional," that the courts may grant full, broad review of the decision. The Supreme Court, in Humphrey v. Moore, 375 U.S. at 345-346, 84 S.Ct. 370, fn. 8, in dealing with the Committee's "power" to decide that a transfer of operating authority was an "absorption," supported this view in saying that a section closely similar to Article 4, Section 5, of the Agreement in this case,

> "* * * by its own terms appears to limit the authority of the committee to disputes over seniority in the event of

an absorption. Reconciliation of these two provisions, going to the power of the committee under the contract, itself presented an issue ultimately for the court, not the committee, to decide."

The appellees, on the other hand, maintain that the District Court was correct in concluding that Article 6, Section 6, was the sole source of the Joint Committee's authority in the first sentence (231 F.Supp. at 715), as this was a dispute over contract interpretation within the intent of that section. This theory leads to the conclusion that the Agreement, having specified a private body to make contract interpretations (whether there was an absorption), the Joint Committee's interpretation can be attacked only by a showing of fraud or deceit.

[5] As we read the several contract provisions outlined above and consider them as part of an entire agreement, we think the appellants are substantially correct. Under Article 4, Sections 1-3 seem concerned with seniority disputes between employees and employer within the setting of a continuing industrial relationship: controversies over the layoff, sick leave, or recall provisions. Section 4 addresses itself to the Union's problems of maintaining seniority for its members when the employer sells his business to another or attempts to lease part of the operation to another. The buyer or transferee may not be unionized or may have his own seniority system, and this section seeks to bind the employer-seller or transferor to make the assumption of the collective agreement a term of the sale, transfer or lease. Such would vastly assist the Union's position with the new employer. In the present case, Eastern falls within the scope of this section as a seller. It might have been argued that M & G, also a party to the multi-employer agreement, was bound to Section 4 as an implied term of its purchase and, accordingly, had agreed to honor the Eastern seniority. Presumably that is why the Joint Committee's decision

held this section inapplicable despite the singular focus of the hearing and arguments on Section 5.

Section 5 appears as an effort of the unions to hedge or protect themselves against another union with rights similar to those in Section 4. Section 5, since another labor agreement including its seniority provisions might be made a term of any absorption, merger, etc., seeks to remove at least seniority from any such deal and provide instead that seniority will not be settled by the employers alone but between the unions and the surviving employer. With due attention for the scheme of this contract and the explicit reference in Section 5 to the Article 6 grievance procedure, the contract seems to contemplate that after the business deal, resort will then be had to the grievance machinery (Joint Committee) to resolve any lack of "mutual agreement" on a post-absorption seniority matter. As noted above at pp. 5-6, the parties considered the possible application of Article 4, Section 5, as the "issue involved" (see footnote 4). Since Article 4 appears within the entire contract as the Article governing all seniority problems,[12a] its application to the dispute through a finding of "absorption" is an important consideration even though Article 6, Section 6, also might apply if Article 4, Section 5 (containing the specific language for seniority matters) was to be subordinate to Section 6's general language. Section 5 refers to an industrial solution to be reached by the "*Unions* involved." In some situations one (or more) of those Unions would not be a party to the employer's agreement and, therefore, would not be bound by Section 5 to look to the Joint Committee to solve the seniority dispute by interpret-

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[12a] For example, Article 4 provides for terminal seniority and in Section 3 states: "A list of the employees arranged in the order of their seniority shall be posted in a conspicuous place at each respective terminal." The dispute should be resolved with consideration of such language as background policy, although the merits decision is solely for the Joint Committee.

ing the contract.[13] Accordingly, we conclude that the Joint Committee on this record should have proceeded under Article 4, Section 5, to determine the controversy with respect to seniority.

III.

The complicating factor in this case is that the same Union represents both groups of employees. This places the Union in a severe dilemma. If they take one side, they jeopardize their position as Union for the employees of the surviving company, M & G. If they take the other, they may jeopardize their relationship as representative of other units of employees, some of whom may in the near future seek seniority "dovetailing" at a strange plant. Local 107's attempt to be "neutral" before the Joint Committee and their subsequent change on the first appeal to advocacy of the appellants' position does not show bad faith any more than it shows breach of its duty of fair representation. Neutrality may have been the only practical position to take before the Joint Committee and the subsequent change of position may be an attempt to save their relationship at other plants, since court reversal of such Committee's decision can occur only in limited circumstances.

Nonetheless, the private decision process under this Agreement contemplates an adversary proceeding with an effective conflict of positions over a seniority dispute, "effective" meaning opposition between parties having some voice in the decision of the Joint Committee. This essential opposition was lacking in this case and calls into doubt the reasonableness of the Joint Committee's decision regardless of which contract provision empowered the determination. If Local 107 was genuinely neutral, the management

[13] In this situation, if the employer follows any seniority request of the non-party union, the objecting union, party to the Agreement, would take its lack of "mutual agreement" with the employer to the Joint Committee.

half of the Joint Committee was most probably not.[14] The would probably increase such seniority),[15] the more M & G more total seniority its employees had (and "dovetailing" would have to pay in certain seniority-based fringe benefits. Moreover, although Joint Committee Chairman Matheson and his firm represented both M & G and Eastern, with only M & G surviving, it is unrealistic to regard him as so neutral in a labor controversy such as the one at bar that he would argue against the M & G president (his client) in bringing out any legal matters that would depreciate the force of his client's contentions. Consequently, the cause of the Eastern employees had, practically, an extremely small chance of success; no decision-maker with any power would take their side. The Supreme Court observed in Humphrey v. Moore that the complaining employees did not suggest any additional facts or theory which could have been added if they had been differently represented. But in Humphrey v. Moore, unlike the present case, of the two employers involved, neither had gone out of business as has Eastern.[16] Accordingly, the management vote in Humphrey v. Moore had a substantial chance of not being unified and the arguments of each group of employees had a substantial chance

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[14] We think it a fair assumption on this record and in light of the contractual scheme of the grievance machinery that the two halves of the Committee would vote along union-management lines if each took a different position.

[15] An affidavit of Charles Weed, M & G's terminal manager, makes clear that higher seniority-keyed costs, as well as a concern for present employee relationships, caused M & G to oppose any dovetailing of Eastern drivers' rights. There was also apparently some minor dispute attendant to the seniority controversy concerning the status of Eastern drivers as employees or "brokers" (owner-operators). This additional factor complicates any system of logical dovetailing.

[16] Humphrey v. Moore, supra, involved two companies who responded to the reduced business by redividing their geographic territories on a more efficient basis.

of being forcefully and competently presented and genuinely considered regardless of the Union's position.[17]

[6] For the above reasons, we think the "jurisdictional" decision of the Joint Committee must be rigorously scrutinized for reasonableness. Contrary to the Supreme Court observation in Humphrey v. Moore, 375 U.S. at 351, 84 S.Ct. at 372, on this record we definitely cannot say it is "idle speculation to assume that the result would have been different had the matter been differently presented." The argument for there having been an absorption of business in this case was made only by employees and their shop stewards. They were opposed by the arguments and unanimous vote of experienced businessmen, lawyers, and professional union agents.

[7] As outlined above, under the Agreement in this case, the consideration of "absorption" was a jurisdictional decision in the Joint Committee's opinion. In the event M & G absorbed the business of Eastern, then the Joint Committee could solve the "merits" of a seniority dispute submitted to it under the last sentence of Article 4, Section 5. The decision that there was no absorption meant that M & G could determine seniority as it wanted with respect to the Eastern employees;[18] it was not a seniority problem open

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[17] The Local in Humphrey v. Moore also changed its position during the course of dispute, only there the Local changed from advocating "bottom of the board" to "dovetailing" before the Joint Committee rendered its decision. The Union's dilemma was probably more acute in Humphrey v. Moore because the "absorbed" employer continued in business in other areas.

[18] Under the scheme of this Agreement and the 1964 Joint Committee decision, if M & G were to accede to any demands of the Eastern drivers, the M & G drivers would possibly have a dispute under Article 4, Sections 1-3, for breach of their seniority rights. Eastern drivers, however, not employed by M & G and excluded from any Section 5 rights, could only hope for redress by means of a dispute with their old employer, Eastern, through Article 4, Section 4, and only through Eastern would M & G possibly be affected.

for "mutual agreement," the lack of which agreement could then be taken to the Joint Committee. Under federal labor law, we think that this "jurisdictional" question is a proper one for the courts, just as it would be if the question before us were whether or not a given dispute should go to arbitration.[19] And under the standard of Humphrey v. Moore, 375 U.S. at 345-347, 84 S.Ct. 363, we think the decision of the Joint Committee was unreasonable and arbitrary. Moreover, since the adequacy of the proceedings before the Joint Committee was not commensurate with the importance of the "absorption" question presented, the court should scrutinize fully the "jurisdictional" application of Article 4, Section 5. Rothlein v. Armour & Company, Inc., supra.

We think that the present record shows M & G absorbed the business of Eastern. The contrary argument, based on a characterization of the Agreement as solely a sale of certain specific assets, is an attempt to make the form of a certain commercial and legal transaction govern all the consequences under federal labor law. This is both unsound and illogical. M & G's purchase was not the equivalent of a purchase of land from a real estate broker and trucks from a dealer. Why, in the face of a significant reduction in business from Chrysler, would M & G buy such a large amount of equipment?

The present record amply demonstrated the oral basis of Chrysler's territory allocation. Chrysler was kept fully informed of the proposed sale from the outset and the presidents of Eastern and M & G met with the Chrysler traffic manager to discuss the sale. Although no testimony proves a specific agreement between Chrysler and M & G to transfer the Eastern business, Eastern's president deposed that he naturally supposed M & G would get Eastern's business if they bought the company. This supposition is important,

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[19] See John Wiley & Sons v. Livingston, supra; the *Steelworkers* "triology," supra, footnote 10; Humphrey v. Moore, supra, at 345-346, 84 S.Ct. 363, footnote 8.

not because it proves an actual transfer or oral assignment of Eastern's business to M & G, but because it shows that the parties entered the assets sale thinking that M & G would service the remaining Eastern dealers not serviced by new railroad deliveries. And after the sale, for whatever reason, this supposed development in fact happened; pending the Joint Committee's decision the appellants continued to deliver to old Eastern dealers for M & G (see finding of District Court, 231 F.Supp. at 712).

In derogation of this showing that M & G "in fact" absorbed some of Eastern's business, M & G and Local 107 pointed to the naked terms of the asset sale agreement and the lack of any transfer or purchase of I.C.C. rights, assets, liabilities or capital stock. In light of the general nature of the phrase "absorbs the business" and the showing that such "business" was based on an oral understanding with Chrysler, not a contract subject to formal transfer, we think that the Joint Committee's decision was unreasonable. The lack of transfer of any I.C.C. rights was totally irrelevant: M & G already had coextensive I.C.C. rights to those of Eastern and the I.C.C. prohibited one carrier from having dual rights to the same geographic area.

The Joint Committee's decision ruled that "there was no corporate acquisition, purchase, or merger within the meaning of Article 4, Section 4 and 5." But this does not preclude the "absorption of business" which, from our reading of the contract, was intended by the drafters of the Agreement to cover transactions that did not fit any recognized legal pigeonhole. Very specific legal phrases were used when necessary—sale, transfer, assignment, lease, merger, etc. But in Article 4, Section 5, the drafters first mentioned the general word "absorbs" followed later by "or * * * merger of lines." "Absorbs" must refer to something different than "merger" and a reading of the entire section shows that "absorbs" was used in an expansive and general sense.

[8] Our decision that the Joint Committee's ruling was unreasonable does not finally solve this dispute. We merely rule that on this record, this seniority controversy should proceed within Article 4 of the Agreement. Having thus exercised our proper judicial function, we return this dispute to the agreed-upon private method of decision. This course is dictated both by the overriding federal labor policy of encouraging private resolution of disputes [20] and by the extremely complicated problems raised in any form of "dovetailing." On this record, the "merits" of this dispute are open to many rational solutions; the parties involved should have the first chance to offer a plan.

Although we are aware that considerable time has passed and significant changes may have taken place in the labor relations of Local 107 and M & G, such considerations would have their proper effect in deciding which of a great many possible seniority solutions is best in this situation. We are confident that the federal labor policy of encouraging responsible private solution of disputes will be advanced in this instance, since Local 107's change of position will distinctly improve the chance of competent and complete presentation of the appellants' contentions and will guarantee a proceeding more adequate under the terms of this Agreement. Moreover, the chance of "deadlocking" the Joint Committee and thus securing arbitration of the dispute is, for the first time, also a distinctly possible alternative. Should the Union again reverse its position to one of neutrality, it ought to make that neutrality genuine by either deadlocking the Joint Committee or, at the very least, seeing that the appellants' position is presented by experienced and competent representatives.[21]

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[20] See, e.g., Republic Steel Corp. v. Maddox, supra.

[21] Such Union conduct would be particularly appropriate, for instance, if new evidence were added in some way which tended to show, despite the present record, a potentially reasonable basis for the Joint Committee's concluding no Article 4, Section 5, "absorption" had occurred in 1964. It would appear that there are

In order to give the chosen contractual scheme a chance to operate fairly and effectively in this complex dispute, (1) the order of the District Court will be reversed; and (2) the District Court will be directed to enter an appropriate order enjoining any party from giving any effect to the January 23, 1964, decision of the Eastern Conference Automobile Transporters Joint Committee. The District Court may decide to retain jurisdiction for purposes of carrying out its injunction, without prejudice to the refiling of an amended complaint should private resolution under the Agreement of this seniority dispute be unavailable or otherwise illegal.

SEITZ, Circuit Judge (dissenting).

The district court decided that under the Collective Bargaining Agreement ("Agreement") the correctness of the Committee's ruling was not subject to judicial review in the absence of relevant fraud, deceitful action or dishonest conduct. Having found no such evidence, it dismissed the complaint. The majority apparently agree with the district court that there was no fraud, etc. in this matter. However, I infer from the majority opinion that the issue is seen as one going to the "jurisdiction" of the Committee to decide the particular grievance. So viewed, they test the Committee's decision by a standard of "reasonableness." I cannot agree that under the language of this Agreement the particular grievance issue decided by the Committee—whether the M & G—Eastern transaction involved a merger or absorption—was one going to its jurisdiction. The grievance raised a threshold problem of interpretation for the Committee but, in my view, that matter came quite clearly

other arguments which might well be advanced on behalf of appellants in further proceedings before the Joint Committee. For example, the possible binding effect of Article 4, Section 4, as to which the appellants would seem to be third-party beneficiaries, might be reconsidered. See p. 13, supra. It does not appear that any arguments directly on this point were made to the Joint Committee.

within the ambit of the substantive provisions of Article 6, Section 6:

> "Unless otherwise expressly provided in this Agreement, any and all disputes, including interpretations of contract provisions, arising under, out of, in connection with, or in relation to this collective bargaining agreement shall be subject to the grievance procedure of the Agreement."

The majority have apparently determined that the broad substantive provision of the quoted Article and Section are not applicable in deciding the Committee's right to make the ruling in dispute. They conclude that they are therefore entitled to test the ruling by a "reasonableness" rather than a "fraud" etc., standard. It is not clear to me how the majority are able to avoid the impact of the substantive provisions of Article 6, Section 6. In my view such provisions are applicable unless it can be said that Article IV, Section 5 (mergers, etc.) is a provision of the kind contemplated by the introductory language of Article 6, Section 6 ("Unless otherwise expressly provided in this Agreement * * *").

There is no doubt that the introductory language of Article 6, Section 6 imposes a limitation on the broad power otherwise conferred on the Committee by that Article and Section. But even if the issue be judged by a "reasonableness" standard, I am unable to find that the Article IV, Section 5 is a provision "otherwise expressly" applicable. Article 6 is headed "Grievance Machinery." The sections thereunder concern themselves solely with the various steps to be taken in processing a grievance. In this setting it seems fair to say that the clause "Unless otherwise expressly provided in this Agreement," refers solely to other provisions of the Agreement which either remove particular grievances, in whole or in part, from the operation of Article 6 or set forth different procedures to cover them.

I think the reasonableness of the foregoing interpretation is supported by an examination of the entire Agree-

ment. For example Article 8, headed "No Strikes or Lockouts," deals first with those matters which are to be settled by the Committee, and then reads:

> "* * * except for the following direct violations, which are indisputable:
>
> 1. Non-payment of the established rates provided in Article 20, Section 2, 4(a) and (b).
> 2. Non-payment of health and welfare contributions as provided for in this Agreement.
> 3. Non-payment of pension contributions as provided for in this Agreement."

The quoted language seems to me to remove that particular subject matter from the operation of Article 6.

Article 9(A), Section 3 and Article 9(B), Section 3, dealing with "Protection of Rights" of employees, both explicitly provide that in processing grievances, the parties may proceed to the Committee "without taking any intermediate steps, any other provisions [in one case 'provision'] of this Agreement to the contrary notwithstanding." The last paragraph of Article 30, Section 2 also contains provisions at variance with some of the mechanics of the grievance procedure set forth in Article 6.

Thus, there are several provisions in the Agreement which, in my opinion, are of the type contemplated by the introductory language of Article 6, Section 6. In contrast, I can find no language in Article IV, Section 5 which removes its subject matter from the operation of the Article 6, Section 6. Nor can I find in it any language which sets forth a procedure which differs from that provided by Article 6. Article IV, Section 5 recites that the Article 6 grievance procedure shall control such matter. One might ordinarily attribute significance to such a particular provision in order to avoid a finding that it serves no particular purpose. But a reading of the Agreement shows that similar language is found in at least 13 other provisions of the Agreement. Thus, the particular reference to Article 6 can-

not be accorded significance under the circumstances. Finally, I think the language of footnote 8 in Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363 (1954) is not applicable to the crucial issue in this case because the Supreme Court was not there concerned with an Agreement containing, inter alia, the crucial introductory language of Article 6, Section 6.

In reviewing the Committee's decision I think the Court was required to interpret the Agreement on the basis that the substantive provisions of Article 6, Section 6 were controlling. So viewed, the district court properly concluded that the correctness of the Committee's decision interpreting the Agreement in relation to the M & G—Eastern transaction was not subject to judicial review.

The parties to the Agreement have seen fit to give the Committee rather broad and conclusive power to interpret and apply it. The law, for the most part, honors such provisions. Obviously some grievance determinations will be made which courts will consider "wrong" or "unfair." I confess that such is my reaction to the merits of the Committee's decision here. But, with deference, the "risk" is inherent in according finality to non-judicial determinations.

I would affirm the district court.

APPENDIX E

Opinion

WRIGHT, Chief Judge.

This matter is before the Court on cross motions for summary judgment. The factual controversy is fully set forth in earlier opinions of this Court and of the Court of Appeals,[1] and it will not be reviewed here. The procedural posture requires, however, some elaboration.

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[1] Bieski v. Eastern Automobile Forwarding Company, 231 F. Supp. 710 (D. Del. 1964), 354 F.2d 414 (3d Cir. 1965), 396 F.2d 32 (2d Cir. 1968).

This Court's opinion denying a temporary injunction, 231 F. Supp. 710 (D.Del. 1964), affirmed as an exercise of discretion, 354 F.2d 414 (3d Cir. 1965), was adopted and incorporated in the order granting summary judgment to defendants. The Court of Appeals reversed the judgment for defendants and remanded the case for further orders and proceedings by this Court. 396 F.2d 32 (3d Cir. 1968). Prior to issuance of the judgment (in lieu of mandate) by the Court of Appeals, the Joint Committee held a rehearing. Plaintiffs attack here, by supplemental complaint, the decision rendered July 18, 1968, upon the rehearing, as violative of the collective bargaining agreement and in contempt of the Court of Appeals' decision.

The Court of Appeals gave two bases for judicial review of the Joint Committee's decision: a procedure inadequate to insure full presentation of opposing interests, and failure at a threshold or jurisdictional level to consider the merits of a dispute committed by the contract to private resolution. In elaborating this dual predicate, the court stated:

> "If the court is convinced both that the contract procedure was intended to cover the dispute and, in addition, that the intended procedure was adequate to provide a fair and informed decision, then review of the merits of any decision should be limited to cases of fraud, deceit, or instances of unions in breach of their duty of fair representation.
>
> If, however, the private decision complained of is a 'jurisdictional' one—that a certain dispute will not be considered on its merits by the private decision-maker —then the court is a proper forum to review this decision on the basis of its analysis of the contract entered into by the parties. John Wiley & Sons v. Livingston, 376 U.S. 543, 546-547. This is particularly true where the court is convinced that a private procedure used for the determination is not adequate to decide fairly and fully such an important initial question. Rothlein v. Armour & Company, Inc., supra."
>
> 396 F.2d at 38.

The court determined that the Joint Committee's decision that "there was no corporate acquisition, purchase, or merger within the meaning of Article 4, Sections— 4 and 5" was "jurisdictional." That decision barred the Committee's consideration of the seniority controversy, because Article 4, Section 5[2] of the Eastern Conference Truckaway and Driveaway Agreement ("Agreement"), to which the unions and employers are adherents, requires an absorption to invoke its grievance procedure. The court also determined that the interests of the plaintiffs had not been adequately represented in the proceedings. With those two justifications, the court examined the Joint Committee's decision and found it to be unreasonable and arbitrary, stating that the Joint Committee "should have proceeded under Article 4, Section 5, to determine the controversy with respect to seniority." Id. at 39.

The question now before this Court is whether the decision of the Joint Committee, upon rehearing held before the Court of Appeals issued judgment, may once again be disturbed. Defendants argue that the limited right of review discussed by the court arises only upon a finding of inadequate representation *and* a determination that the decision is "jurisdictional." Since the procedural infirmities found were remedied in the rehearing, their position is that this Court may not review the decision, even though it be "jurisdictional." For the reasons stated below, the Court concludes that it has not only the authority but the duty to nullify the decision and to order the Joint Committee and the other defendants to proceed forthwith to the long overdue resolution of this controversy.

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[2] Article 4, Section 5 reads as follows:

Section 5. *Mergers, Etc.*

In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the grievance procedure.

The Court of Appeals held that "the present record shows that M & G absorbed the business of Eastern." Id. at 41. It ruled that "on this record, this seniority controversy should proceed within Article 4 of the Agreement." Id. at 42. Whether or not the rehearing mooted the issues before the Court of Appeals by withdrawing the effect of the first Joint Committee decision, that court's interpretation of the law and its judgment on the record before it are binding here. In the absence of new evidence supporting a contrary conclusion,[3] the law of the case precluded a finding of no absorption and compelled the Joint Committee to proceed to the merits of the seniority controversy.

Even were this Court without guidance as to the specific transaction between Eastern and M & G, however, the decision rendered in this case is authority for its review.

The court above never stated the two bases it discussed in the conjunctive. It noted that the need for review was especially great when the procedure was not adequate to assure fair and full representation on "jurisdictional" questions, but it found ample authority to arise from the nature of the question alone.[4] Thus, this Court need not

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[3] Footnote 21 of the opinion indicates that introduction of new evidence on the absorption issue was permissible and that reconsideration on the basis of that evidence was not precluded. 396 F. 2d at 42, n. 21.

[4] In addition to the passages quoted in the text, the Court of Appeals indicated the disjunctive nature of the jurisdictional prerequisites in the following language:

> ". . . we think that the 'jurisdictional' question is a proper one for the courts, just as it would be if the question before us were whether or not a given dispute should go to arbitration (citing John Wiley & Sons v. Livingston and the *Steelworkers* 'trilogy').
>
> . . . Moreover, since the adequacy of the proceedings before the Joint Committee was not commensurate with the importance of the 'absorption' question presented, the court should scrutinize fully the 'jurisdictional' application of Article 4, Section 5. Rothlein v. Armour & Company, Inc., 391 F.2d 574 (3d Cir. 1968)."

find inadequacies in presenting the interests of the M & G employees to review a Joint Committee decision that no absorption occurred. A finding of no absorption at the rehearing is no less subject to judicial scrutiny than was the first such finding.

On July 18, 1968, the Joint Committee again decided that M & G had no duty to recognize the seniority rights of former Eastern drivers, "since the facts and evidence submitted and presented this date show that there was no intent to corporate acquisition, merger or absorption within the meaning of said Article 4, Sections 4 and 5." Careful review of the proceedings held before the Joint Committee on July 17, 1968,[5] reveals no evidence presented which would reasonably and fairly warrant a finding that there was no absorption. The only new evidence consisted of decisions by the Joint Committee in similar cases and an affidavit that the former president of Eastern was not on the M & G board of directors, as had been previously represented. The opinions, of course, do not change the factual configuration of the transaction in question. The affidavit has only marginal significance.

Whether the Joint Committee misinterpreted the Court of Appeals' decision or attempted to avoid it, this Court has no alternative but to return the dispute and direct the Joint Committee to determine the seniority controversy on its merits. This course is dictated, as the Court of Appeals said, "both by the overriding federal labor policy of encouraging private resolution of disputes and by the extremely complicated problems raised in any form of 'dovetailing.'" Id. at 42. The controversy is certainly open to rational solution, and the Committee must undertake the task.

Defendants contend finally that plaintiffs have no standing to sue since there is no evidence of fraud, collusion,

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[5] The record of the proceedings before the Joint Committee was presented to the Court by stipulation of the parties.

breach of the union's duty of fair representation, or of procedural infirmity. That contention is without merit. The Court of Appeals stated that a finding that no breach of the duty of fair representation occurred would not dispose of the matter. Id. at 37. Neither of the two bases it prescribed for review requires a showing of fraud or collusion. Judicial review is predicated on inadequacy "of the private decision in terms of the controversy presented." Id. at 37-38. See also Rothlein v. Armour & Company, Inc., 391 F.2d 574 (3d Cir. 1968). At any rate, the decision of the Court of Appeals that plaintiffs may maintain this action is binding on this Court and further inquiry is not necessary.

An order requiring defendants to comply with this decision within ninety days will be signed upon its presentation to the Court.

Wilmington, Delaware

July 9, 1970

VIII.

ORDER.

This matter having been presented to the Court upon cross-motions for summary judgment, and the Court having considered the briefs and argument of the parties and having filed its opinion on July 9, 1970, it is

ORDERED, that plaintiffs' motion for summary judgment is granted, and that the joint committee shall proceed within ninety days to determine the seniority controversy on its merits in accordance with this Court's opinion.

/s/ CALEB M. WRIGHT,

C. J.

DATED: August 7, 1970

APPENDIX F

Opinion and Order

WRIGHT, Chief Judge.

This matter is before the Court on the plaintiff's Petition for a Rule to Show Cause and For Other Relief brought against the defendant Eastern Conference Automobile Transporters Joint Committee (Joint Committee). The case has been before this Court and the Third Circuit Court of Appeals on numerous prior occasions and its legal and factual background has been set forth fully in the earlier opinions of both courts.[1] The issue raised in the present petition is whether the Joint Committee has complied with the order of this Court and the rulings of the Third Circuit in its resolution of the Eastern and M & G seniority dispute as set forth in its January 25, 1971 decision. The Court is of the opinion that it has not.

On July 9, 1970, the Court issued an opinion nullifying the Joint Committee's second decision that M & G had not absorbed Eastern and directed the Joint Committee to determine the merits of the seniority dispute. On January 7, 1971, after the defendants had failed to comply with the Court's order, the Court issued an order which read in pertinent part:

> 1. The defendants are enjoined from giving any effect to the Joint Committee's decisions of January 23, 1964 or July 17, 1968.
>
> 2. The Joint Committee is directed to promptly hear and decide the seniority rights of the individual plaintiffs based upon some form of dovetail of the seniority lists of the defendants Eastern and M & G as they existed at the time of the absorption of Eastern's business by the defendant M & G and to decide on its

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[1] Bieski v. Eastern Automobile Forwarding Company, 231 F. Supp. 710 (D. Del. 1964); 354 F.2d 414 (3rd Cir. 1965); 396 F.2d 32 (3rd Cir. 1968).

merits the right of the individual plaintiffs to monetary damages.

3. This Court shall retain jurisdiction for the purpose of seeing that this order is appropriately complied with.

The Joint Committee held a hearing on the seniority issues on January 13, 1971 at which time the several parties were afforded the opportunity to present their respective positions on the issue. On January 25, 1971, the Joint Committee rendered the decision which is being challenged in the instant petition.

In its decision, after briefly setting the history and nature of the controversy, the Joint Committee discerned four categories of individuals whose seniority rights were in issue:

FIRST:

There are the employees of M & G who were working for this company prior to 1964 and who have employment rights which are superior and prior to any others.

SECOND:

There are the employees who sought and obtained employment with M & G in March 1964 and following who have accumulated approximately seven years of employment rights by active service for M & G.

THIRD:

There are the employees hired by M & G, who have worked for Eastern but who have accumulated varying years of employment rights since 1964.

FOURTH:

There are the former employees of Eastern who have never worked for M & G and whose employment rights arise solely because of the Court's decision.

Jt. Comm. Rpt. p. 1.

It then proceeded to determine these groups' seniority rights as follows:

> "In accommodating all of these various 'rights' it is recognized that there are not sufficient jobs to satisfy all of these claims and some of the claimants may achieve a place on an employment list with little or no chance for employment. This disappointment should be confined, as far as possible, to those who have worked the least for M & G and still recognize the employment rights ordered by the Court.
>
> "Accordingly, only at the direction of the Court and not based upon the collective bargaining obligation or based on past decisions of this Committee, which in the Committee's opinion were a correct reflection of the interest of the collective bargaining agreement in effect in 1964, the seniority list will be prepared in the following manner:
>
> 1. All employees of M & G who were on the list in January 1964.
> 2. All former Eastern employees who were hired by M & G in 1964 in order of their hire.
> 3. All former Eastern employees who have never worked for M & G in order of their seniority at Eastern.
> 4. All present employees of M & G hired after 1964 who never worked for Eastern. . . .
>
> The former Eastern employees being added to this list will have a March 1964 date for fringe benefits in the future, thus protecting their vacation rights as though they had come to work at that time. . . ."
>
> Jt. Comm. Rpt. pp. 1-2

Finally, the Joint Committee found that none of the individual plaintiffs were entitled to damages because M & G had followed its decisions.

> "No employees have suffered a loss because employment was not denied to any former Eastern employee who sought available work with M & G in accordance with the decision and collective bargaining in effect.

Furthermore, M & G complied with all decisions of the Committee and no damages would be awarded, even if same were suffered, because the company is obligated under the collective bargaining agreement to follow the decisions of this Committee. Where two men seek an available job and the employer assigns the work pursuant to a decision of this Committee, the employer cannot be held liable without seriously impairing the procedures, discipline and respect for this Committee's decisions."

Jt. Comm. Rpt. p. 2

The Court clearly ordered that the Joint Committee decide the seniority rights of the plaintiffs as of the date of the absorption of Eastern's business. This it has failed to do. The choice of the March 1964 date for future fringe benefits and the differentiation between those Eastern drivers who were employed by M & G after March 1964 and those Eastern drivers who have never worked for M & G clearly evidences that the Joint Committee considered matters subsequent to the date of pertinent inquiry.[2] The demarcation between two groups of Eastern drivers on the basis of occurrences after the absorption cannot be justified under the Court's order to determine the rights as of the date of the absorption. Contrary to the Joint Committee's repeated references that the plaintiffs' rights arose subsequent to the transaction and solely on the basis of court decisions, the seniority rights of the Eastern drivers arose from the Eastern Conference Area Truckaway and Driveaway Agreement (Agreement) as a result of and at the time of M & G's absorption of Eastern's business. The Third Circuit has clearly ruled that on the record such an absorption occurred within the meaning of the Agreement, 396 F.2d at 41, and that the Joint Committee must determine the seniority question under Article 4, Section 5 in light of the fact M & G absorbed Eastern's business. Since

[2] The defendants' suggestion that such considerations are permissible in light of certain language in the Third Circuit's second opinion is not persuasive.

the seniority rights arise out of the absorption and the Agreement, they must be determined as of the date of the absorption, and pursuant to the Agreement. No distinctions may be made on the basis of acts or employment occurring after the January 1964 absorption.

A second issue concerns the Joint Committee's inclusion of the second category of individuals, those hired by M & G subsequent to March 1964 who never worked for Eastern. These individuals were not involved in the controversy or the Court's order, and their seniority status was not properly before the Joint Committee.

A third issue involves the resolution of the fringe benefit question. Once again, the Joint Committee's responsibility was to determine these rights as of the January 1964 absorption and not at some subsequent time which it deemed appropriate.

Finally, the Court is of the opinion that the question of damages must be re-examined in light of the above infirmities in the Joint Committee's decision.

In spite of the plaintiffs' requests that the Court decide the seniority issue, the Court is of the opinion that the Joint Committee remains the appropriate body to make this resolution. The Joint Committee has repeatedly indicated its disagreement with and disapproval of the Third Circuit's holding that the record indicates that M & G absorbed Eastern's business within the terms of the Agreement. Nonetheless, this ruling is the law of the case and binding upon the Joint Committee. Therefore, it must hear and determine the seniority question under the Agreement in light of the finding that an absorption occurred. It must determine the plaintiffs' seniority rights under the Agreement at the time of M & G's absorption of Eastern's business. It must consider and determine all the separate aspects of the seniority question. Finally, after this determination is made, it must resolve the damage question.

The Court has not attempted to dictate the ultimate decision or to constrain the scope of the Joint Committee's discretion. However, it must require the Joint Committee to assume its responsibilities under the Agreement to render a good faith determination of the seniority issues involved herein.

For the reasons stated above, the defendants are enjoined from giving any effect to the Joint Committee's decision dated January 28, 1971, and the Joint Committee will be afforded sixty days to hear and determine the seniority questions presented herein in a manner which comports with the opinions of this Court, the Third Circuit Court and the Agreement to avoid being held in contempt for failure to comply with orders of this Court. In light of the Joint Committee's recalcitrant attitude toward acceptance of its responsibilities as stated in the opinions and orders of this and the Third Circuit Court, the Joint Committee shall state in detail the reasons for its decision on the seniority issues.

For the reasons stated above, it is hereby ORDERED:

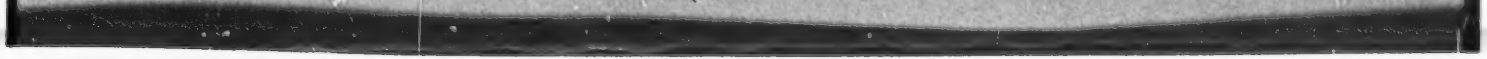
1. The defendants are enjoined from giving any effect to the Joint Committee's decisions of January 25, 1971.

2. The Joint Committee is directed to hear and decide the disputed seniority rights in the manner set forth in the Court's order of January 7, 1971. Such decision shall be rendered in sixty (60) days and state in detail the reasons for the result reached.

3. This Court shall retain jurisdiction for the purpose of seeing that this and previous orders are appropriately complied with.

/s/ CALEB M. WRIGHT
Chief Judge

March 2, 1973



SUPREME COURT, U. S.
OCT 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-252

LAWRENCE E. BIESKI, ET AL., *Petitioners*

v.

EASTERN AUTOMOBILE FORWARDING COMPANY, INC., M & G CONVOY, INC., and HIGHWAY TRUCK DRIVERS AND HELPERS, LOCALS 107 AND 326, Unincorporated Associations Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Eastern Conference Automobile Transporters Joint Committee, *Respondents*

BRIEF OF M & G CONVOY, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF M & G CONVOY, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Now comes M & G Convoy, Inc., a defendant below and one of the Respondents in this Court, and opposes grant of a writ of certiorari to review the final judgment of the United States Court of Appeals for the Third Circuit which was entered in this case on June 11, 1974.

QUESTIONS PRESENTED

In the judgment of this Respondent, the sole question presented by this petition may fairly be restated as follows:

Whether a court can interfere with a decision made by a joint employer-union grievance committee in

the absence of fraud, collusion or a breach of the duty of fair representation. Respondent submits that question must be answered in the negative. A subsidiary question raised by the Petition may be whether the duty of fair representation which is imposed upon a union by virtue of its designation as the exclusive bargaining representative of a group of employees applied to representatives of different unions sitting on a joint employer-union grievance committee. Again, the respondent submits that the question must be answered in the negative.

STATUTES INVOLVED

In addition to Section 301(a) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185(a), cited by the petitioners, this Respondent submits that Section 203(d) of the same Act, 29 U.S.C. § 173(d), is equally applicable:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

COUNTER STATEMENT OF THE CASE

One type of dispute which must routinely be handled in the administrative of every collective baragaining agreement is that which results from the partial or complete cessation of operation by one of the employer-parties to the contract. In the trucking industry, this type of dispute very often results from the acquisition by one employer of some or all of the business of another employer. As this Court recognized in *Humphrey* v. *Moore,* 375 U.S. 335, 346 (1964), these are "commonplace events" in the transportation industry.

Following such an event, "the recurring question is . . . [which] employees . . . are to have the first call upon the available work." *Id.* Simply because such events are commonplace, the transportation industry, and the unions which represent employees in that industry, have over the years evolved a system of joint employer-union arbitration to resolve this question of seniority among the driver-employees of the companies involved. In *Truck Drivers Union* v. *Riss & Co.*, 372 U.S. 517 (1963), and again in *Humphrey* v. *Moore, supra,* this Court held the awards of such tribunals to be immune from judicial review. Once again, this Court is called upon to review decisions of two lower federal courts which quite properly refused to intervene in a matter which has traditionally been left to employer-union arbitration committees.

M & G Convoy, Inc. (hereafter "M & G" or "M & G Convoy") and Eastern Automobile Forwarding Co., Inc. (hereafter "Eastern") were both common carriers engaged in the transportation of automobiles throughout parts of the eastern United States. Both groups of employees were represented by Teamsters Local 107, Philadephia, and they were both covered by the same labor contract, the Eastern Conference Area Truckaway and Driveaway Agreement. *Bieski* v. *Eastern Automobile Forwarding Company,* 231 F.Supp. 710, 713 (D. Del. 1964).[1] As a result of increased rail competition, economic conditions forced Eastern out of business in early 1964. M & G Convoy purchased all of Eastern's real estate and substan-

[1] The essential underlying facts are not in dispute. This specific finding was also made by the Court of Appeals. 354 F.2d 416, fn. 1 (3d Cir. 1965). It was reaffirmed by the trial court on August 2, 1967, J.A. 56, 60 and, again, by the Court of Appeals. 396 F.2d 32, 35 (3d Cir. 1968).

tially all of its operating equipment, but did not purchase its other assets, liabilities, certificates, good will or accounts receivable. By January of 1964, M & G Convoy was transporting all cars formerly handled by Eastern. 231 F.Supp., at 712.

Certain of the driver-employees of Eastern sought, and attained, employment with M & G. 396 F.2d, at 34. A controversy developed between those employees and the original M & G employees over seniority rights. *Id.* The collective bargaining agreement to which Eastern, M & G and the unions were parties contained provisions designed to govern this dispute. Article 4, Section 1 provided: "Terminal seniority will be maintained . . . ." Article 4, Section 5 provided:

> "In the event that an Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the grievance procedure (Article 6)."

Article 6 then provided a multi-step grievance procedure culminating in a joint employer-union committee known as the Eastern Conference Automobile Transporters Joint Committee (hereafter "Joint Committee"). The Joint Committee was established to settle disputes and grievances which could not be settled at a lower level; it was empowered to hear witness and take evidence in support of the respective positions; it was further empowered to investigate all facts pertaining to the dispute. That Article further provided that a Joint Committee deadlock was to be submitted

to an impartial arbitrator and it also provided that in the event of non-compliance with a decision, the parties had the immediate right to legal and economic recourse. Article 6, Section 6 concluded:

> "Unless otherwise expressly provided in this Agreement, any and all disputes, including interpretations of contract provisions, arising under, out of, in connection with, or in relation to this collective bargaining agreement shall be subject to the grievance procedure of this Agreement."

See 231 F.Supp., at 713; 396 F.2d, at 34-35. It was, in short, a comprehensive system for the private settlement by the parties of all disputes arising under the contract.

In 1964, the Joint Committee, after hearing the case, concluded that there had been no "absorption" within the meaning of Article 4, Section 5 of the collective bargaining agreement and that, as a result thereof, the Eastern drivers had no seniority rights at M & G. In effect, to the extent any Eastern drivers were employed by M & G, this meant that they took seniority at the bottom of the M & G seniority list, beneath the seniority which had already been earned by existing M & G employees. 231 F.Supp., at 714-715; 396 F.2d, at 36.

A group of former Eastern employees then commenced this litigation in the United States District Court for the District of Delaware. The Complaint was filed in January 1964. It alleged dishonesty and collusion between the employers and the union involved and, as to the union, it alleged the breach of the union's duty of fair representation. J.A. 19-34.[2]

[2] "J.A." references are to the Joint Appendix filed in the Court of Appeals in No. 73-1882, the case from which the petition ema-

A preliminary injunction was sought and in July 1964 Chief United States District Judge Caleb M. Wright denied that injunction. 231 F.Supp. 710. The Court of Appeals for the Third Circuit affirmed that denial. 354 F.2d 414. Significantly, in denying the plaintiffs' motion for preliminary injunction, the trial court found:

> ". . . there is no indication that a conspiracy was formed to coerce or persuade the Committee unjustly to find no absorption . . . . There is no substantial evidence that the employers and the Union conspired to subvert the function of the Committee . . . ."
>
> * * *
>
> "The evidence is insufficient to support these contentions, and, more important, it does not substantiate the charge that the Union acted in a manner inconsistent with its duty to represent the

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nates. The many opinions of the trial court and of the Court of Appeals are there found:

(a) Opinion denying plaintiffs' motion for preliminary injunction—J.A. 35-49, July 16, 1964; also found at 231 F.Supp. 710.

(b) Opinion affirming—J.A. 50-55, December 29, 1965; also found at 354 F.2d 414.

(c) Opinion granting defendants' motions for summary judgment—J.A. 56-60, August 2, 1967.

(d) Opinion reversing in part with directions—J.A. 61-80, May 29, 1968; also found at 396 F.2d 32.

(e) Opinion reversing Joint Committee decision—J.A. 142-151, July 9, 1970.

(f) Opinion again reversing Joint Committee decision—J.A. 295-305, March 2, 1973.

(g) Opinion sustaining Joint Committee decision—J.A. 454-464, July 12, 1973.

This latter decision was affirmed without opinion by the Court of Appeals. Petitioners' Appendix A.

best interests of its members." 231 F.Supp., at 716.

The Court of Appeals did not disagree. 354 F.2d, at 417.

During the course of the original arbitration proceedings, Teamsters Local 107 maintained a neutral position. 231 F.Supp., at 714. During the early course of the litigation, however, the stewardship at Teamsters Local 107 (and their legal representation) changed hands. 354 F.2d, at 417; 396 F.2d, at 36. From that point on, Teamsters Local 107 espoused the cause of the former Eastern drivers in all further proceedings before the Joint Committee. Having denied a preliminary injunction, the trial court then proceeded to a hearing on the merits and, in an unreported decision in August of 1967 (see J.A. 56-60), Judge Wright considered cross-motions for summary judgment, denied that of the plaintiffs and granted that of the defendants. In that opinion, the trial court reiterated its findings of fact against the plaintiffs:

> "Accordingly, the Court finds that its previous statement of facts is unaltered . . . . The Court is further of the opinion that the factual and legal issues involved have been fully discussed in its previous opinion of July 16, 1964 [J.A. 35-49; 231 F.Supp. 710] . . . . Therefore, the Court deems it appropriate to do no more than reaffirm its opinion of July 16, 1964 . . . adopting the facts and conclusions of that opinion, and incorporating them by reference herein." J.A. 56, at 59-60.

Again, the plaintiffs appealed. In May 1968, the Court of Appeals reversed, one judge dissenting. 396 F.2d 32. Before doing so, however, the court affirmed the facts as found by the trial court:

> "On this record . . . we affirm the conclusion of the District Court that the appellants failed to

> show a breach of the duty of fair representation sufficient to allow the courts to interfere on that basis with the agreed-upon private determination of a labor dispute." 396 F.2d, at 37.

The reversal was on the very narrow ground that the Joint Committee decision to the effect that there had been no "absorption" within the meaning of the contract was "jurisdictional" in nature. The Court of Appeals reasoned that it had a broader scope of review on such "jurisdictional" rulings by joint employer-union arbitration panels than it did on rulings which went to the merits of, and actually decided the seniority issue in, the case.[3] The case was remanded through the trial court to the Eastern Conference Automobile Transporters Joint Committee with what amounted in instructions to determine the seniority status of the Eastern employees as if there had been an "absorption" by M & G of Eastern. 396 F.2d, at 42.

Following remand, there were new hearings before the Joint Committee. At the first such hearing, the Joint Committee, apparently considering itself free to find anew that there had been no "absorption", rejected the argument of Teamsters Local 107, and found no "absorption". This was set aside by the trial court as having been contrary to the opinion of the Court of Appeals. J.A. 142. Following yet another remand by the trial court on the same "jurisdictional" grounds, J.A. 295, the Joint Committee met again, agreed that the seniority dispute must be decided in view of the fact that "the Court held that M & G did absorb Eastern" and proceeded to determine seniority in accordance with that conclusion. J.A. 447-450. Once again, dissatisfied with this new result, the former

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[3] That decision has been criticized. See Note, 55 Va. L.Rev. 368 (1969).

Eastern employees went to court. This time, the United States District Court applied the traditional principle which it (and the Court of Appeals) had all along recognized, that decisions on the merits of seniority disputes, where committed by the parties to a form of arbitration, are not to be set aside absent the traditional exceptions of fraud, collusion, breach of contract or a finding that the union was in a breach of its duty of fair representation. J.A. 454-464.[4] The trial court rejected any such conclusions and in effect affirmed the decision of the arbitral tribunal. *Id.* The Court wrote:

> "The plaintiffs have repeatedly requested that the Court undertake either a comprehensive review of the merits of the Joint Committee decision or that it determine the seniority issues. The Court has consistently refused either course and has limited its efforts to insuring that the Joint Committee fulfill its contractual obligations by assuming jurisdiction over the seniority dispute. This

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[4] The courts below never had any doubt of that legal principle. In its first opinion, the trial court had held:

> "Where within the framework of labor agreements, unions and management have provided by contract for the settlement of disputes, the courts have sought to foster the collective bargaining process by refusing to interfere with decisions reached through the procedure established by the parties. Absent fraud or conspiracy, the courts have pursued a 'hands-off' policy." 231 F.Supp., at 715 (footnote omitted).

He reiterated this conclusion in two later opinions. J.A. 56, at 60; J.A. 454, at 461:

> "Therefore, the review of the merits of the decision is limited to cases of fraud, deceit and breach of a duty of fair representation. These issues have been decided previously, and the plaintiffs have submitted no additional evidence to alter the Court's prior determination."

And, see J.A. 463-464. The Court of Appeals never disagreed with this principle.

having been accomplished, the Court has no further power of review in this controversy." J.A. 463-464.

This time the Court of Appeals affirmed without opinion and, after 10 years of litigation, the plaintiffs have brought the case to this court.

REASONS FOR DENYING THE WRIT

1. As this case finally comes to this Court, it presents no new or novel questions despite the fact that it has been lingering in the judicial system for ten years. Each court which has reviewed this case, the District Court on at least four occasions and the Court of Appeals for the Third Circuit on three (see fn. 2, *supra*), applied the standards set out by this Court in an unbroken line of cases beginning with *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953), running through the "steelworkers trilogy", *Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 (1960); *Steelworkers* v. *Enterprise Corp.,* 363 U.S. 593 (1960); *Steelworkers* v. *Warrior & Gulf Co.,* 363 U.S. 574 (1960), and culminating in the trucking industry with cases such as *Truck Drivers Union* v. *Riss & Co.,* 372 U.S. 517 (1963), and *Humphrey* v. *Moore,* 375 U.S. 335 (1964). These cases and scores of others in the federal appellate [5] and trial

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[5] Simply by way of illustration, see *Ludwig Honold Mfg. Co.* v. *Fletcher,* 405 F.2d 1123 (3d Cir. 1969); *Fuller* v. *Highway Truck Drivers and Helpers Local 107,* 428 F.2d 503 (3d Cir. 1970); *Price* v. *International Bro. of Teamsters, etc.,* 457 F.2d 605 (3d Cir. 1972); *Safeway Stores* v. *American Bakery & Con. W.I.U., Local 111,* 390 F.2d 79 (5th Cir. 1968); *Wilson* v. *Kroger Co.,* 369 F.2d 85 (6th Cir. 1966); *Morris* v. *Werner-Continental, Inc.,* 466 F.2d 1185 (6th Cir. 1972); *Andrus* v. *Convoy Company,* 480 F.2d 604 (9th Cir. 1973), *cert. denied* 414 U.S. 989 (1973). In the typically direct language of Judge John R. Brown of the Fifth Circuit: "The arbiter was chosen to be the Judge. That Judge has spoken. There it ends." 390 F.2d, at 84. See also Dunau, *Three Problems in Labor Arbitration,* 55 Va. L.Rev. 427 (1969). The National Labor Relations Board follows the same approach. *Collyer Insulated Wire,* 77 L.R.R.M. 1931 (1971).

courts have established the proposition that in situations in which the parties have provided for the final adjustments of contract disputes, the courts will not interfere in the absence of fraud, collusion, infidelity to the contract, lack of due process or a basic illegality in the award. With the very narrow exception of the original ruling by the Court of Appeals requiring the arbitral body to come to grips with the merits of the seniority dispute and not content itself with what the Court of Appeals described as a "jurisdictional" decision, each court which reviewed this case over the past decade has applied that rule. See 231 F.Supp., at 715; J.A. 56, at 60; J.A. 454, at 461. Once the arbitral body did reach the merits, the courts quite properly adopted a hands-off policy. J.A. 463-464. No court has suggested any impropriety in the manner by which the joint employer-union committee arrived at its decision on the merits once it reached the merits of this controversy. See 231 F.Supp., at 716; 354 F.2d, at 417; J.A. 56, at 60; 396 F.2d, at 37; J.A. 454.

Congress has expressly declared that the private settlement of industrial disputes is desirable. Section 203(d) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 173(d), expressly so provides:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

The courts, including this Court, have made it clear that the "final adjustment" of which the Congress spoke may either be by outside arbitrators [6] or by com-

[6] As in the "steelworkers trilogy."

mittees of the contracting parties. Such joint committee awards have precisely the same effect as outside arbitration awards. *Truck Drivers Union* v. *Riss & Co.*, 372 U.S. 517 (1963). Thus, "if the award at bar is the parties' chosen instrument for definitive settlement of grievances under the Agreement . . . it is of course not open to the courts to reweigh the merits of the grievance." *Id.*, at 519. That is precisely what the petitioners, having failed in the courts below, now ask this Court to do.

With this Court having held in *Truck Drivers Union* v. *Riss & Co.* and *Humphrey* v. *Moore*, both *supra*, that contract grievance awards are entitled to the same weight as those emanating from other private arbitration tribunals, the exceptions to the rule of finality accorded such awards must be limited to those which are applied to awards by outside arbitrators: infidelity to the contract, lack of due process, a basic illegality in the award or collusion in the arbitral process. This Court precisely so held in *Truck Drivers Union* v. *Riss & Co.*, 372 U.S., at 519. To the extent that the complaint even suggested any of these elements, the courts below have consistently and repeatedly rejected them in the exercise of their fact-finding powers. In denying the plaintiffs' original motion for preliminary injunction, the trial court found:

> "... there is no indication that a conspiracy was formed to coerce or persuade the Committee unjustly to find no absorption .... There is no substantial evidence that the employers and the Union conspired to subvert the function of the Committee ...."
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> * * *
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> "The evidence is insufficient to support these contentions, and, more important, it does not sub-

> stantiate the charge that the Union acted in a manner inconsistent with its duty to represent the best interests of its members." 231 F.Supp., at 716.

The Court of Appeals did not disagree. 354 F.2d, at 417. In granting summary judgment for the defendants, the trial court reiterated its findings of fact against the plaintiffs:

> "Accordingly, the Court finds that its previous statement of facts is unaltered . . . . The Court is further of the opinion that the factual and legal issues involved have been fully discussed in its previous opinion of July 16, 1964 [J.A. 35-49; 231 F.Supp. 710] . . . . Therefore, the Court deems it appropriate to do no more than reaffirm its opinion of July 16, 1964 . . . adopting the facts and conclusions of that opinion, and incorporating them by reference herein." J.A. 56, at 59-60.

Even in reversing, the Court of Appeals affirmed the facts as found by the trial court:

> "On this record . . . we affirm the conclusion of the District Court that the appellants failed to show a breach of the duty of fair representation sufficient to allow the courts to interfere on that basis with the agreed-upon private determination of a labor dispute." 396 F.2d, at 37.

Finally, the trial court again concluded:

> "Therefore, the review of the merits of the decision is limited to cases of fraud, deceit and breach of a duty of fair representation. These issues have been decided previously, and the plaintiffs have been submitted no additional evidence to alter the Court's prior determinations." J.A. 454, at 461.

This Court must reject, as it has always rejected, the petitioners' invitation to invade the fact finding process properly committed by law to the lower courts.

The facts reveal a grievance body confronted with a "commonplace event" in the trucking industry—a situation in which, because of the economic collapse of one employer, two groups of employees are competing for the same jobs and the same seniority. The fact that these two groups are represented by the same union is of no moment. Any allegation of impropriety resulting therefrom was specifically put to rest by *Humphrey* v. *Moore,* 375 U.S., at 349-350; and see *Fuller* v. *Highway Truck Drivers and Helpers Local 107,* 300 F.Supp. 643, 648 (E.D. Pa. 1969), *aff'd* 428 F.2d 503 (3d Cir. 1970). If the former Eastern employees were placed at the bottom of the seniority list at M & G, they would have a grievance. If they were integrated into the existing M & G seniority lists, the M & G employees would have a grievance. It was precisely for the purpose of resolving this type of problem that joint employer-union grievance committees have been established within the trucking industry.[7] It has been recognized for years that a collective bargaining agreement is "more than a contract: it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Steelworkers* v. *Warrior &*

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[7] The contract in question leaves the seniority dispute to determination by means of the grievance procedure. Article 4, Section 5, in pertinent part, provides:

> ". . . the seniority of the employees . . . affected thereby shall be determined by mutual agreement between the Employer and the Union involved. Any controversy with respect to such matter shall be submitted to the grievance procedure (Article 6)."

See 231 F.Supp., at 713.

Gulf Co., 363 U.S. 574, 578 (1960). It is an effort "to erect a system of industrial self-government." *Id.*, at 580. "The processing of disputes through the grievance machinery [of a collective bargaining agreement] is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *Id.*, at 581. "The grievance procedure is, in other words, a part of the continuous collective bargaining process." *Id.* See, also, Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1498-99 (1959). This Court has continually so held and this case presents no occasion to vary these rulings.

2. The petitioners make another argument. It is an argument that was not presented until the very last time this case was before the Court of Appeals. Since the Court of Appeals affirmed without opinion, there is no lower court opinion on this point. The point, simply stated, is that union members of joint employer-union grievance committees are bound by the same duty of fair representation as are the unions (and their agents) which specifically represent employees. The argument is wrong. It proceeds from a mistaken impression of the origin of the duty of fair representation. If accepted, notwithstanding petitioners' protestations to the contrary (Petition, p. 9), it would be destructive of established contract grievance procedures providing for joint employer-union committees.

The duty of fair representation arises from the position of a union as the exclusive bargaining representative for employees of a given employer. Traditionally, if a union seeks to represent a given unit of employees and a contest ensues, the National Labor Relations Board conducts an election. If the union

wins that election, it is then certified as the exclusive collective bargaining representative, not only of those employees who voted for the union, but of all employees within the bargaining unit. Quite obviously, this may often include employees who had no desire to be represented by the union and even those who were adverse to the union. This premiere position with which the federal labor law endows such a union carries with it a fiduciary duty that the union fairly represent *all* of the employees in the bargaining unit; not just those who favor the union, not just those who are union members, but all covered employees. This, then, is the origin of the duty of fair representation which the courts have imposed upon unions and which can be enforced in suits at law by union members whose rights thereunder have been abridged. As one court has fairly summarized:

> "The fiduciary duty of fair representation in the negotiation, administration and enforcement of collective bargaining agreements has been imposed upon unions by federal law as an obligation correlative to the right of a union to represent all the employees in the bargaining unit as their exclusive bargaining agent despite the contrary wishes of a minority. The duty originated in cases under the Railway Labor Act in which railroad unions were charged with racial discrimination. It has since been expanded as a principle of general application to collective bargaining representatives, who are required to 'serve the interest of all members without hostility or discrimination toward any, to exercise [their] discretion with complete good faith and honesty, and to avoid arbitrary conduct'." *Bazarte* v. *United Transportation Union*, 429 F.2d 868, 871 (3rd Cir. 1970) (footnotes omitted).

See, also, *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967); *Humphrey* v. *Moore*, 375 U.S. 335, 342 (1964); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L. Rev. 663 (1973).

Given the origin of the duty of fair representation, and the fact that it is imposed upon a union by virtue of that union's certification as the exclusive bargaining representative for a unit of employees, it is impossible to conclude that union members of a joint employer-union grievance committee are governed by any such duty. In the first place, as the record here amply demonstrates, representatives of a union whose members are the grievants do not sit on the committee which hears such a case. In this instance, none of the union representatives on that panel were officers, employees or representatives of Teamsters Local 107. J.A. 310-311. The duty of fair representation imposed upon Teamsters Local 107 as a result of its certification as the exclusive bargaining representative for the Eastern drivers cannot be transferred to the union members of the grievance panel. These men are arbitrators and judges—not advocates. While they may bring with them certain labor- or management-oriented predispositions, they are not "representatives" in any legal sense. To make such an argument indicates a basic misconception of the origin of the duty of fair representation.

The argument contains an even greater vice. Carried to its logical extreme it would destroy the joint-committee system. If union members of joint employer-union arbitration tribunals are bound by such a duty, they would logically be bound, in all but the most egregious case, to support the union proponents before them. Logically, this would mandate a "dead-

lock" in almost every case; and, in the many instances in which the collective bargaining agreement does not provide for final neutral arbitration, it would leave the parties to the collective bargaining agreement to pursue any economic remedies which they had. In effect, a union in almost every case, no matter how insignificant, could take economic actions—could strike—to obtain its objective. Nothing could be more destructive of "a system of industrial self-government," *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. at 580, then such a ruling. As this Court observed in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 455 (1957):

> "Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike."

CONCLUSION

In 1967, the trial court wrote:

> "This suit is already three years old, and time is an unsettling factor, especially in litigation of this nature." J.A. 56, at 60.

Six years later, in 1973, the trial court again observed:

> "The case is presently before the Court on the motion of M & G for an order enforcing the joint Committee's most recent decision. In essence, M & G is desirous of a prompt determination by the Court of whether the Joint Committee has finally complied with the order of this Court . . . . Although of a somewhat unusual nature, M & G's request for immediate review of the Joint Committee decision is certainly understandable given the rather tortured path of this litigation.
>
> "In light of this factor and the obvious difficulties confronted by M & G in attempting to observe the directive of the Joint Committee under its

> contractual obligations as well as the orders of this Court, the Court is of the opinion that it should entertain M & G's motion . . . ." (J.A. 454, at 460.

It did so and found it to be in full compliance. *Id.*, at 454-464.

M & G Convoy for ten years now has been engaged in this dispute over the seniority status of the former Eastern employees whom it hired. For ten years it has stood ready to abide by whatever decision the joint employer-union committee reached. For ten years the decisions of that body have been in the courts. Those decisions have now finally been made on the merits of the dispute and upheld by both lower courts. Now the petitioners seek a review of that decision on the merits by this Court. This they cannot have, as a long line of cases from this Court and from other courts clearly hold. M & G, the employer, is entitled finally to have its peace. We respectfully submit that the Court should deny the petition for a writ of certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-252

LAWRENCE E. BIESKI, ET AL., *Petitioners*

v.

EASTERN AUTOMOBILE FORWARDING COMPANY, INC., M & G CONVOY, INC., and HIGHWAY TRUCK DRIVERS AND HELPERS, LOCALS 107 AND 326, Unincorporated Associations Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Eastern Conference Automobile Transporters Joint Committee, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF EASTERN CONFERENCE AUTOMOBILE TRANSPORTERS JOINT COMMITTEE

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bile Forwarding Company, Inc. (herein Eastern). M & G did not purchase Eastern's assets, liabilities, ICC certificates, licenses, good will, accounts receivable or cash. Employees of M & G and Eastern were both represented by Respondent Local 107 (herein Union) and were both covered by the same collective bargaining agreement. That agreement was a multi-employer-multi-union contract covering employees employed in the transportation of automobiles in the eastern United States. Eastern's demise was the result of increased rail competition.

The Union presented a grievance involving the seniority of the M & G and Eastern drivers. Article 4, Section 3 of the labor contract states that any controversy over seniority shall be subject to the grievance procedure (J. A. 28-29). 1/ Article 6, Section 6 of the labor contract states that "any and all disputes, including interpretations of the contract provisions . . . shall be subject to the grievance procedure of this agreement" (J. A. 32). Sections 3 and 4 of Article 6 specifically state that a decision of the Grievance Committee shall be final and binding (J. A. 31). Article 4, Section 5 provides:

> Section 5. Mergers, etc.
>
> In the event that the Employer absorbs the business of another private, contract or common carrier or is a party to a merger of lines the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the grievance procedure (J. A. 30).

1/ "J. A." references are to the Joint Appendix filed in the Court of Appeals. References "-a" are to the Petitioner's Appendix which is attached to its Petition.

The Grievance Committee is composed of an equal number of employer and Union representatives (J. A. 30-31). In a particular case, the Grievance Committee panel consists of those employers and Unions who are not involved in the controversy (J. A. 85-86).

In its original decision, the Grievance Committee ruled that there was no absorption under the labor contract and, therefore, the Eastern drivers had no rights to jobs for seniority with M & G. This decision was reversed by the Third Circuit on July 28, 1968 which concluded that there was an absorption and the Grievance Committee should determine the seniority issue (13a-34a). The Third Circuit stated "the merits of this dispute are open to many rational solutions" (30a).

After the Third Circuit's decision, there were three hearings before the Grievance Committee. The hearing which is before this court was held on April 10, 1973 and the Grievance Committee decision was dated April 20, 1973. All parties and employees were represented and presented evidence and arguments before the Grievance Committee. None of the parties to the dispute were represented on the Grievance Committee which heard the case and there were no objections to the Grievance Committee panel (J. A. 306-311). There was disagreement whether company or terminal seniority should apply, but in

general, the Union and the Eastern drivers 2/ contended that they should be dovetailed with the M & G drivers based on the overall seniority of both groups (J. A. 321-325, 415-417, 426-428).

The M & G drivers urged that the Eastern drivers should go to the bottom of their seniority roster because they had sacrificed to make M & G profitable, whereas Eastern went out of business (J. A. 331-351). M & G submitted that it should not be required to credit the Eastern drivers with seniority they enjoyed with Eastern (J. A. 400).

The Grievance Committee ordered that M & G must offer jobs to all Eastern employees; that Eastern drivers shall go on the bottom of the M & G seniority list as of January 1964 when M & G first hired Eastern drivers, but ahead of new hires who were hired after January 1964; that Eastern drivers shall retain Eastern seniority for vacation benefits; and that the Eastern drivers who were Plaintiffs below shall receive credit for pension benefits as if they had been continuously employed by M & G (7a-12a).

The case went to the district court on M & G's motion to enforce the Grievance Committee decision of April 20, 1973. The Petitioner, Eastern drivers, raised 22 specific objections which were directed at the merits of the Grievance Committee decision (4a-5a). The district court found that there was no fraud or deceit which would nullify

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2/ Actually the Eastern drivers who were Plaintiffs below argued that only they should receive their Eastern seniority and benefits on the theory that the other Eastern employees accepted the original Grievance Committee decision in 1964 and did not participate in the litigation (J. A. 324-325).

the Grievance Committee decision and no lack of good faith or honesty of purpose on the part of the Union (3a, 5a; see also 20a, 31a). Accordingly, the district court refused to review the merits of the Grievance Committee decision and granted M & G's motion to enforce the arbitration award (6a).

The Court of Appeals for the Third Circuit affirmed the judgment of the district court without an opinion.

REASONS FOR DENYING THE WRIT

I. The decision of the Grievance Committee should not be reviewed on the merits absent fraud, collusion or a breach of the duty of fair representation. This proposition must be examined in the light of the district court's decision since there was no opinion written by the Third Circuit. The district court concluded that the Grievance Committee properly assumed jurisdiction and decided the seniority issue in accordance with its authority under the collective bargaining agreement. This conclusion is consistent with Article 4, Section 5 and Article 6, Sections 3 and 4 of the labor contract which gave the Grievance Committee the power, authority and discretion to make a final and binding seniority determination in the situation in which one employer absorbed another. The crucial finding of the district court was that there was no fraud, deceit or a breach of the duty of fair representation. In fact, the district court noted that the thrust of the Petitioners' objections to the Grievance Committee decision were not aimed at these issues but went to the merits of the dispute (5a). In these circumstances, the dis-

trict court refused the attempt of the Eastern drivers to enmesh it in the merits of the Grievance Committee decision, and accordingly, enforced the arbitration award.

The decision in this case is entirely consistent with the admonitions of this court. In the Steelworkers Trilogy, this court stated that:

> Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U.S.C. §173(d), states: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . . ." That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full pay. United Steelworkers v. American Manufacturing Co., 363 U.S. 564, 566 (1960).

In order to give the Grievance Committee decision "full play" the courts must refrain from reviewing the merits of the decision because "plenary review by a court of the merits would make meaningless the provision that the Arbitrator's decision is final for in reality it would almost never be final." United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 599 (1960). The court emphasized that "the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's

construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." Id at 599.

The criteria for arbitration as established by the Steelworkers Trilogy was applied to joint employer-union grievance committees by this court in 1963. Drivers Union v. Riss & Co., 372 U.S. 517 (1963). There this court held that "if . . . the award of the joint . . . committee is under the collective bargaining agreement final and binding, the district court has jurisdiction under §301 to enforce it . . ." Id at 519. This court added that "if the award at bar is the party's chosen instrument for the definitive settlement of grievances under the agreement, it is enforceful under §301. And if the joint . . . committee's award is thus enforceable, it is, of course, not open to the courts to reweigh the merits of the grievance." Id at 519.

Here the labor contract did not dictate how seniority disputes should be resolved in an absorption case, but reserved the determination for the discretion of the Grievance Committee and made its decision "final and binding" (J. A. 15-31). In 1964, Riss, supra was reaffirmed by this court in circumstances where the joint committee and the parties did not exceed their power under the contract and there was no fraud or breach of duty by the Union. "The decision of the Committee, reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is." Humphrey v. Moore, 375 U.S. 335, 351 (1964).

II. The doctrine of fair representation is not applicable to the Grievance Committee. The Committee is made up of an equal number of employer and Union representatives. In accordance with the labor contract and the facts in this case, a panel which is convened to hear and decide a particular dispute may not include any representative of the employer or Union who is involved. Neither the employers nor the Unions interest are represented on the joint committee and under no circumstances is any representative of the Grievance Committee an agent of the employee's exclusive bargaining representative.

The purpose of the Grievance Committee is to act as an impartial arbitration board to resolve labor disputes under the collective bargaining agreement. The duty of the Grievance Committee members who hear a grievance is to vote their convictions. There is no evidence in this record of any restrictions on members of the Grievance Committee which might in any way tend to require that they vote along "party" lines or that their vote was in any way predetermined or even predisposed. The Grievance Committee is vital to the collective bargaining agreement because it is the party's rational alternative to the economic weapons of the strike and lockout. It is in the interest of the parties to the labor contract to give the members of the Grievance Committee as much freedom as possible to function within the confines of the language of the agreement. The obligation of the Grievance Committee is not the duty of fair representation, but it is the obligation to apply and interpret the collective bargaining agreement

on a day-to-day basis.

The district court did not consider this issue because the Petitioners failed to articulate and brief the problem. The Third Circuit summarily rejected the argument by its silence. The Petitioners' novel theory is contrary to the mandatory language under this collective bargaining agreement and the facts in this case. Finally, the Petitioners are unable to present any precedent for such a theory.

III. The decision of the Grievance Committee did not lack procedural due process. The Petitioners did not raise this issue in the district court and therefore, it must be deemed to have been waived. Order of Railway Conductors v. Clinchfield RR Co., 407 F. 2d 985, 988 (C. A. 6, 1969). In essence, this argument is tied to the assertion that the duty of fair representation is applied to the Grievance Committee. According to the Petitioners, the employer representatives on the Grievance Committee necessarily vote for M & G's interest, but the Union representatives on such committee are neutralized because there are two groups of employees with clashing interests. Petitioners' argument is without foundation in the record. The Petitioners try to butress the argument by characterizing the Union's representation as "lackadaisical" and "perfunctory" (Petitioners' Brief, page 12). The Petitioners failed to mention that the Union agreed with the Eastern drivers and urged the Grievance Committee to dovetail the M & G and Eastern drivers based on the overall seniority of both groups of

employees (J. A. 415-417, 426-428). Further, it is noteworthy that in the Petitioners' Brief to the Third Circuit, they stated that Mr. Bottone, the Union's representative before the Grievance Committee, "proceeded to urge dovetailing and then spoke admittedly eloquently and persuasively about dovetailing in the past" (Petitioners' Brief to the Third Circuit, page 32).

The attack on the quality of the Union's representation is unwarranted as a matter of fact and incorrect as a matter of law. In Vaca v. Sipes, 386 U.S. 171 (1967) the Supreme Court reversed a holding of the Missouri Supreme Court that a jury could properly have found the union had arbitrarily failed to represent the plaintiff in the handling of his grievance by refusing to take his case to arbitration. "A breach of the duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190.

The union's duty of fair representation is the duty to refrain from "hostile discrimination" based on "irrelevant or invidious" considerations, or conduct which is "arbitrary, discriminatory, or in bad faith." Thus, to prove a breach of that duty, the record must show by substantial evidence that the union was motivated in its actions by hostility, malice or bad faith. Dill v. Greyhound Corp., 435 F. 2d 231 (C.A. 6, 1970). Proof that the union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation. Bazarte

v. United Transportation Union, 429 F. 2d 868 (C. A. 3, 1970). The union's duty is not a general duty of due care, as in the law of negligence, but only a duty of good faith. Brough v. United Steelworkers of America, 437 F. 2d 748 (C. A. 1, 1971); Walden v. Teamsters Local Union No. 71, 468 F. 2d 196 (C. A. 4, 1972). There must be more than an improper action by the union; the union must have acted with malice and bad faith. Brady v. Trans World Airlines, 401 F. 2d 87, 104 (C. A. 3, 1968). There is no such evidence in this case.

IV. The Grievance Committee's decision was rational. The collective bargaining agreement did not specify one particular solution, but reserved the resolution of the seniority dispute to the discretion of the Grievance Committee. That Committee's decision placing the Eastern drivers on the bottom of the M & G seniority list did not violate the labor contract. Neither did the decision disregard industrial experience in the car haul industry. The testimony before the Grievance Committee indicated that in the few cases in the car haul industry where a question of an absorbtion was involved, there were cases in which no carryover seniority was permitted (J. A. 115-132). cf. Andrus v. Convoy Company, 408 F. 2d 604 (C. A. 9, 1973) cert. denied, 414 U. S. 989 (1973).

A review of the Court decisions in the related but more experienced freight industry reveals that bottom (foot) of the list seniority is not at all uncommon or unusual. The following "bottom of

the list" seniority determined by joint committees were left undisturbed by the courts: Fuller v. Highway Truck Drivers Local 107, 428 F. 2d 503 (C.A. 3, 1970); Morris v. Werner-Continental, Inc., 466 F. 2d 1185 (C.A. 6, 1972); Williams v. The Kroger Company, 369 F. 2d 85 (C.A. 6, 1966); Ampagoomian v. Johnson Motor Lines, 331 F. Supp. 262 (DC, R.I., 1971); Brady v. Consolidated Freightways Corp., ____ F. Supp. ____(DC, Ohio, 1972), 82 LRRM 2245; Quinn v. Dixie Highway Express, Inc., ___ F. Supp. ____ (DC, Ala., 1972), 79 LRRM 2894; Smith v. Yellow Freight System, Inc., ___F. Supp. ____ (DC, Ohio, 1972), 79 LRRM 3079; Aff'd, -F. 2d 83 LRRM 2047 (6th Cir. 1972), Cert. denied 411 U.S. 966. Turley v. Hall's Motor Transit Company, 296 F. Supp. 1183 (DC, Pa., 1969); Brown v. Truck Drivers Local 355, 292 F. Supp. 125 (DC, Md., 1968), enf. 416 F. 2d 1333 (C.A. 4, 1969).

The fairest approach may have been to credit all employees with their total length of service in the industry or with these two companies. This would have required the Joint Committee to unravel all the alleged inequities of the past. Even the Eastern drivers were opposed to such an approach. cf. (J. A. 341, 369-379). The seniority problem in this case is more complex than appears on the surface, but in any event the courts should not prefer one method of seniority integration as against any other. Truck Drivers Local 568 v. NLRB (Red Ball Motor Freight, Inc.), 379 F. 2d 137, 142 (C. A. D.C., 1967). "Judicial Review of Grievance Committee Deci-

sions," 55 Va. L. Rev. 369 (1969); Dunan, "Three Problems in Labor Arbitration," 55 Va. L. Rev. 427, 438-439, 460 (1969).

CONCLUSION

For all of the reasons stated herein, the Petition for a Writ of Certiorari should be denied.

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